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o. 88-1719-CFX Title: Chauffeurs, Teamsters and Helpers, Local No. 391, Petitioner
tatus: GRANTED _ v.
Thomas C. Terry, et al.

ocketed:
pril 18, 1989 Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: James,J. David, Gold,Laurence

Counsel for respondent: Elliot,Robert M.

ntry	Date	Note	Proceedings and Orders
1	Mar 10 1989	G	Application (A88-722) to extend the time to file a petition for a writ of certiorari from March 20, 1989 to April 19, 1989, submitted to The Chief Justice.
2	Mar 14 1989		Application (A88-722) granted by the Chief Justice extending the time to file until April 19, 1989.
3	Apr 18 1989	G	Petition for writ of certiorari filed.
4	May 22 1989		Brief of respondents Thomas C. Terry, et al. in opposition filed.
5	May 30 1989		DISTRIBUTED. June 15, 1989
6	Jun 19 1989		Petition GRANTED.
			**********
8	Jul 19 1989		Order extending time to file brief of petitioner on the merits until August 18, 1989.
9	Aug 18 1989		Brief amicus curiae of National Railway Labor Conference filed.
10	Aug 18 1989		Brief amicus curiae of Chamber of Commerce of the U.S. filed.
11	Aug 18 1989		Joint appendix filed.
12	Aug 18 1989		Brief of petitioner Chauffeurs Teamsters, etc. filed.
13	Aug 26 1989		Record filed.
		*	Certified copy of original record and proceedings, 2 volumes, received.
15	Sep 21 1989		Order extending time to file brief of respondent on the merits until September 30, 1989.
17	Sep 26 1989		SET FOR ARGUMENT WEDNESDAY, DECEMBER 6, 1989. (2ND CASE)
16	Sep 28 1989		Brief amicus curiae of Teamsters for Democratic Union filed.
18	Sep 29 1989		Brief of respondents Thomas C. Terry, et al. filed.
19	Oct 5 1989		CIRCULATED.
20	Oct 30 1989	X	Reply brief of petitioner Chauffeurs, Teamsters, etc. filed.
21	Dec 6 1989		ARGUED.

88- 1719

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JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

UNITED STATES SUPREME COURT

October Term 1988

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL NO. 391,

Petitioner,

v.

THOMAS C. TERRY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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8-1988

QUESTION PRESENTED

Is there a right to a jury trial in an action by employees against their union alleging that the union breached its duty of fair representation -- a duty which has been implied from § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a)-- whenever the employees seek monetary compensation in any form (e.g., back pay) as a part of their request for relief?

PARTIES

The parties to this proceeding are petitioner, Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Helpers and Warehousemen of America, AFL-CIO, and respondents Thomas C. Terry, Dan Fields, Jim Crowe, Keith Barker, James A. Richards, Don Wright, David L. Giltz, Dale Bishop, Tony, Baity, James R. Davis, Don Britt, Lonnie Davis, Jim Wilson, David C. King, Donald E. Henderson, Arthur Jarrell, Ron Ray, J. C. Greer, Gary Peebles, Harold Dyson, Ed Strange, Sam E. Callahan, George C. Blankenship, Jr., Paul Embry, Clayton Worley, John R. Marshall, and Robert C. Munsey.

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NO. 88-

UNITED STATES SUPREME COURT

October Term 1988

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL NO. 391,	)
Petitioner,	)
v.	)
THOMAS C. TERRY, et al.,	)
Respondents.	)

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Helpers and Warehousemen of America, AFL-CIO (hereinafter "Local 391"), respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in Terry, et al. v. Chauffeurs, Teamsters and Helpers Local No. 391, 4th Cir. No. 87-3896 (December 10, 1988).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is reported at 863 F.2d 334 (1988), and is reprinted at pp. 30-52 of the Appendix. The Memorandum Opinion of the United States District Court for the Middle District of North Carolina denying petitioner's motion to strike the respondents' jury trial demand is reported at 676 F.Supp. 659 (1987) and is reprinted at pp. 1-30 of the Appendix. The decision of the Court of Appeals granting Local 391's petition for an interlocutory appeal is reprinted at p. 30 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals

was entered on December 20, 1988. On March 10, 1989, Local 391 applied for an extension of time to file this Petition for Writ of Certiorari. That application was granted on March 14, 1989 by order of the Chief Justice extending the time for filing this Petition to and including April 19, 1989. This petition is being filed within that extended time period. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides as follows:

> In [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

The duty of fair representation claim is implied from § 9(a) of the National Labor

Relations Act, 29 U.S.C. § 159(a), which provides:

> (a) Representatives designated or selected for purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided, further, That the bargaining representative has been given the opportunity to be present at such adjustment.

STATEMENT OF THE CASE

1. On July 25, 1983 the respondents commenced this action in the District Court against Local 391, their employer, McLean Trucking Company (hereinafter "McLean") and the International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America (hereinafter the "International"). The facts, as alleged in the complaint and as recounted in the opinion of the Court of Appeals, are as follows.

Respondents were all drivers who were employed by McLean and who lived in locations other than Winston-Salem, North Carolina. Because of a change of operations, the terminals near plaintiffs' homes were closed and they bid and were transferred to McLean's Winston-Salem terminal. After they transferred to the Winston-Salem terminal, they were laid off and recalled on several occasions. McLean and Petitioner were parties to a collective bargaining agreement. Respondents contend that McLean had breached the agreement by manipulating recall procedures so as to give other drivers preference over them and that Local 391 failed to fairly represent

them in the resulting grievances. See Appendix at 33-34; 863 F.2d at 335.[1]

The first set of grievances filed by respondents were pursued by Local 391 in arbitration, and, as a result, McLean was ordered to adjust its layoff policy to comply with previous agreements between McLean and Local 391. In a subsequent set of grievances, however, respondents contended that McLean then engaged in a pattern of layoff and recall activity in order to circumvent the prior arbitration award. Appendix at 34; 863 F.2d at 335.

Local 391 pursued respondents' second set of grievances to arbitration, as well.

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[1]Although the Complaint named the International as a defendant, the District Court granted the International's motion for summary judgment. Appendix at 32, n.1, 863 F.2d at 335 n.1. Similarly, although the Complaint named McLean as a defendant, McLean has since filed a petition in bankruptcy, and the action against McLean was stayed. Id. Respondents eventually filed a voluntary dismissal as to McLean.

But the grievances were denied. Appendix at 34; 863 F.2d at 336. Local 391 declined to take a third set of grievances to arbitration because all of the issues had been decided in the first and second arbitration awards.

2. In their complaint, respondents contended that because of the asserted breach of the duty of fair representation, the arbitration awards should not be final and binding but should be set aside. The complaint also sought declaratory and injunctive relief, compensatory damages for lost wages and benefits, attorney's fees and costs, reinstatement, punitive damages and damages for mental and emotional distress. By Order dated January 9, 1989, the District Court struck the respondents' claim for punitive damages for mental and emotional distress.

On January 6, 1986, Local 391 filed

its Motion to Strike Plaintiffs' Jury Trial Demand. Although the District Court denied the Motion (Appendix at 1; 676 F.Supp. 659), in an order dated November 10, 1987 it certified the jury trial issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On November 19, 1987, Local 391 petitioned the Court of Appeals for permission to appeal pursuant to 28 U.S.C. § 1292(b), and that petition was granted by order of the Fourth Circuit dated December 17, 1987. By opinion entered on December 20, 1988 (Appendix at 31; 863 F.2d 336), the United States Court of Appeals for the Fourth Circuit affirmed the District Court's order.

REASONS FOR GRANTING THE WRIT

I. Because a Clear Conflict Exists Among The Courts of Appeals, Certiorari Should Be Granted To Resolve Whether Plaintiffs Have a Right To a Jury Trial In Duty of Fair Representation Suits Against Unions Whenever Back Pay Is Sought.

This case presents a recurring issue in a particularly active area of the federal labor law that has created substantial uncertainty in the lower courts, including a clear conflict among the circuits: Does the Seventh Amendment's preservation of jury trial rights "in [s]uits at common law" guarantee a jury trial when an employee brings an action against his or her union alleging that the union has breached the duty of fair representation (the "DFR") -- as derived by implication from § 9(a) of the National Labor Relations Act (hereinafter "NLRA"), 29 U.S.C. § 159(a) -- and seeks some form of monetary compensation (e.g., back pay) from the union as one element of relief.

A. The Fourth Circuit -- in holding that there is a jury trial right in such cases -- recognized that the United States Court of Appeals for the District of

Columbia Circuit and the United States Court of Appeals for the Eleventh Circuit had come to contrary conclusions on this issue, and the Fourth Circuit aligned itself with the D.C. Circuit. See Appendix at 45; 863 F.2d at 338 (contrasting Quinn v. DiGiulian, 739 F.2d 637 (D.C. Cir. 1984) (holding that plaintiffs in DFR suits are entitled to jury trial if seeking back pay) with Leach v. Pan American Worlds Airways, 842 F.2d 285 (11th Cir. 1988) (holding that plaintiffs in DFR suits have no right to jury trial).[2]

Moreover, subsequent to the decision below, the Sixth Circuit rejected the claim

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[2]Although the Leach decision involved an action for breach of the duty of fair representation under the Railway Labor Act, 45 U.S.C. §§ 151-188, rather than the NLRA, the Court of Appeals in that case correctly noted that the same rules would apply to actions under the NLRA. 842 F.2d at 287 n.2 (for purposes of fair representation suits courts have refused to distinguish the two acts) (citing Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)).

of DFR plaintiffs to a jury trial right. See Deringer v. Columbia Transportation Div., Slip Op. No. 87-3392 (6th Cir. January 30, 1989) (holding that there is no right to jury trial in duty of fair representation suit where no explicit demand for monetary damages was made against a union, and noting that a demand for lost wages would be considered demand for equitable, not legal relief); see also Wood v. International Brotherhood of Teamsters, 807 F.2d 493, 504 (6th Cir. 1986) (Contie, J. concurring) (arguing against jury trial right in duty of fair representation suit); id. at 504 n.3 (in an opinion that does not reach issue, majority nevertheless notes in dicta its general agreement with position of concurrence).

Thus, at this time, four of the Courts of Appeals have considered the question presented here and have divided evenly as

to its proper resolution.[3]

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[3]Although two courts of appeals decisions prior to Quinn v. DiGiulian, supra, had held that DFR plaintiffs, at least in some circumstances, have a right to a jury trial, see Cox v. H. Masland & Sons, Inc., 607 F.2d 138 (5th Cir. 1979) (jury trial right where no equitable relief is sought); Minnis v. International Union, UAW, 531 F.2d 850 (8th Cir. 1975) (same), it is doubtful that those decisions will be viewed as commanding any binding precedential force.

Both decisions based their conclucions on the theory that DFR actions are closely analogous to common law contract or tort actions, and this Court has subsequently rejected precisely those analogies in a related context. See DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 165 (1983) (refusing to analogize duty of fair representation action to common law contract or tort actions for purposes of determining proper statute of limitations and stating that a duty of fair representation action "has no close analogy under ordinary state law"); United Parcel Service v. Mitchell, 451 U.S. 56, 62 n.4 & 63 (1981) (rejecting analogy of duty of fair representation claims to common law tort or contract claims and noting unique history of duty of fair representation as "creature of labor law").

Based on DelCostello and Mitchell, the Eleventh Circuit expressly rejected the continued precedential value of Cox, see Leach v. Pan American, supra, 842 F.2d at 286-286, even though decisions from the

B. The conflict in the circuits is not a mere fortuity; rather, it is the product of the recurrence of the jury trial issue in the many fair representation cases brought in the federal courts and reflects the difficulty the trial courts have had in resolving the issue. Our survey of the opinions on this issue in those district courts outside of the Fourth, Sixth, Eleventh and D.C. Circuits (viz. outside the circuits which have already ruled on the question) shows the recurrent nature of this issue, and the chaotic pattern of

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"old Fifth Circuit" are normally binding precedent in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc). And the issue of the continued precedential value of Minnis is currently presented to the Eighth Circuit in Brownlee v. Yellow Freight System, 88-2663-EM & 88-2664-EM. See also Spicher v. Wilson Foods Corp., 122 LRRM 3168, 3170 (C.D. Ill. 1985) (pre-Mitchell cases holding that there is right to jury trial have no persuasive authority since they rest on rejected contract and tort analogies).

decisions the issue has generated. See, e.g., Pappas v. Jewel Co. Inc., 126 LRRM 3103 (N.D. Ill. 1987) (right to jury trial); Woods v. Dunlop Tire Co., 673 F.Supp. 117 (W.D.N.Y. 1987) (right to jury trial); Spicher v. Wilson Foods Corp., 122 LRRM 3168 (C.D. Ill. 1985) (no right to jury trial); Cook v. National Maritime Union, 617 F.Supp. 1052 (S.D.N.Y. 1985) (right to jury trial); James v. Universal Manufacturing Co., 109 LRRM 2858 (S.D. Miss. 1981) (no right to jury trial); Shanley v. U.P.S., 101 LRRM 2190 (E.D.N.Y. 1979) (no right to jury trial); Harrison v. Chrysler Corp., 60 F.R.D. 9 (S.D. Ind. 1973) (no right to jury trial); Brady v. Trans World Airlines, 196 F.Supp. 504 (D. Del. 1961) (no right to jury trial), aff'd on other grounds, 402 F.2d 87 (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969).

Against this background, and because

this case presents a clear opportunity for the Court to resolve this issue, certiorari should be granted. Further litigation in the lower courts cannot resolve this issue, but will only deepen the conflict and risk the inconsistency of results in an area of the law where Congress and this Court have declared uniformity a prime virtue.

II. The Well-Established Method of Analysis of This Court In The Area of Seventh Amendment and Duty of Fair Representation Law Leads to The Conclusion That Duty of Fair Representation Plaintiffs Do Not Have a Right To a Jury Trial.

A right to a jury trial can stem either from statute or from the Seventh Amendment itself. As we now show, neither source supports a demand for a trial by jury in a fair representation case. Thus, the decision below is not only in conflict with other Court of Appeals decisions, that decision is on the wrong side of the conflict.

A. The threshold question whenever a jury trial is sought with respect to a federal statutory cause of action is whether Congress has created such a right. Tull v. United States, 481 U.S. 412, 417, n.3 (1987). Here, the cause of action has been "judicially implied from the [NLRA and Railway Labor Act] and the policy [of exclusive representation] which [those acts] adopted." Electrical Workers v. Foust, 442 U.S. 42, 47 (1979), quoting Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 204 (1944). Since the NLRA does not even mention a duty of fair representation or explicitly provide any cause of action for breach thereof, that statute does not, in terms, create a jury trial right for fair representation claims. Indeed, the fair representation cause of action "had not yet [been] divined" when Congress passed the NLRA in 1935, United

Parcel Service v. Mitchell, supra, 451 U.S. at 76.

In enacting the NLRA, however, Congress did consider whether to authorize jury trials as the method of adjudicating the unfair labor practice actions created by the Act, and Congress specifically declined to authorize trials by jury. NLRB v.Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937). And, in DelCostello v. Teamsters, supra, 462 U.S. at 170, the Court recognized the "substantial overlap" and "family resemblance" between the fair representation cause of action and the unfair labor practice cause of action. Given this similarity, the fair inference of Congress's actions in 1935 is clear: because Congress did not intend that unfair labor practices under the NLRA be tried to juries, it follows that Congress would not have intended juries to try closely

analogous actions derived by implication from the NLRA.

B. The issue in this case thus reduces to whether in the absence of any Congressional intent to provide such a right, the Seventh Amendment itself requires a jury trial for fair representation cases.

The Seventh Amendment, which provides that "[i]n [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," has been held to preserve "the right which existed under the English common law when the Amendment was adopted." Baltimore and Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935). Application of the Amendment to statutory causes of action thus turns on "whether [the] action is more similar to cases that were tried in courts of law [or] to suits tried in courts of

equity or admiralty." Tull v. United States, supra, 481 U.S. at 417. That comparison is made through a two-pronged examination, focusing on the nature both "of the action and of the remedy sought," id. at 417:

> [T]he Court must examine both the nature of the action and of the remedy sought. First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature. [Id. at 417-418 (internal citations omitted).][4]

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[4]The Court had previously stated the proper examination as a three-prong test, adding as the third prong an inquiry into "the practical limitations of a jury trial and its functional compatibility with" the action in question. Tull v. United States, supra, 481 U.S. at 418 n.4. See, e.g., Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970) (stating three-prong test). In Tull, however, the Court made clear that this third prong served only as a limit on the right to a jury trial, and could not serve as "an

As we now show, applying this two-prong approach to the instant issue leads to the conclusion DFR plaintiffs do not have a jury trial right.

First, a comparison of an action for breach of the duty of fair representation to "18th-century actions brought in the courts of England," 481 U.S. at 417, reveals, of course, that nothing like the fair representation duty was known to traditional common law; the DFR is a "creature of labor law." United Parcel Service v. Mitchell, supra, 451 U.S. at 63. Indeed, as we have noted, this Court has explicitly refused to analogize a suit for breach of the duty of fair representation to traditional common law tort or contract actions, finding instead that such a suit

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independent basis for extending the right to a jury trial under the Seventh Amendment." 481 U.S. at 418 n.4.

is a vital part of the overall federal labor law scheme and "has no close analogy in ordinary state law." DelCostello v. Teamsters, 462 U.S. at 165.

Although not closely analogous to any traditional cause of action, the duty of fair representation does rest on the traditions of equity. In particular, that duty rests on the equitable principles relating to a fiduciary's responsibilities to those on whose behalf he is charged to act. As this Court explained in Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944) -- the case which first recognized the fair representation duty -- the duty is an instance of the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." Id. at 202. At the time when the

Seventh Amendment was adopted the enforcement of such a fiduciary duty was, of course, well within traditional equity jurisdiction. Then, as now, actions to enforce such a duty were tried without a jury. See generally 4 Scott on Trusts §§ 197 & 281 (3d ed. 1967).

Second, an evaluation of the remedies sought in duty of fair representation suits bolsters the conclusion that the suit is predominantly equitable. This Court has made clear that a court exercises a wide discretion in crafting the remedy to be awarded in a fair representation suit. In Vaca v. Sipes, 386 U.S. 171 (1967), the Court noted that "[t]he appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach," id. at 195, and that "an order compelling arbitration should be viewed as one of the

available remedies when a breach of the union's duty is proved." Id. at 196. A duty of fair representation suit is thus far from the traditional legal action where damages are awarded as of right. Cf. Curtis v. Loether, 415 U.S. 189, 196-197 (1974). Instead, such a suit is "equitable" in character since the court retains the authority to award equitable relief (such as an order of arbitration) if, under the circumstances of a particular case, the court deems such relief more appropriate than monetary relief. Choosing between monetary and injunctive relief was, of course, not an available option in a pre-merger common law court, and it is not an option within the normal powers of a jury.

Moreover, in many DFR cases, including the present one, the plaintiffs are entitled to no relief unless an underlying arbitration

award -- which would otherwise be final and binding -- is set aside. And vacating an arbitration award is a purely equitable form of relief. (Thus in this case, plaintiffs' request for monetary relief (or any other relief) is intimately intertwined with -- indeed wholly dependent upon -- the equitable relief of setting aside the arbitration award adverse to them.)

While injunctive relief was not available in a pre-merger legal action, monetary relief was available in equity. Availability of monetary relief is thus wholly consistent with equity. Federal law has long reflected this, recognizing that a remedial scheme modeled on equity may award back pay -- even as the presumptive remedial option -- and yet not lose its equitable character. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 413-425 (1975) (Title VII remedy provisions are modeled on

NLRA remedies, NLRA remedies are equitable in nature, and equitable nature of Title VII action is wholly consistent with policy that courts should normally exercise their discretion to award full make-whole relief, including back pay); id. at 441-447 (Rehnquist, J. concurring). Indeed, the NLRA -- from which the duty of fair representation is derived -- is a clear example of such a scheme: the Act provides no right to a jury trial; back pay has been awarded as a matter of course under NLRA practice. Id. at 419-420 (discussing NLRA back pay practice as example of equitable scheme involving routine use of back pay, and noting that this was model for remedial scheme of other statutes).

Against this background, those circuits that have found a jury trial right in duty of fair representation cases on the ground that monetary awards of back pay are

available, see Appendix at 49-50; 863 F.2d at 339; see also Quinn v. DiGiulian, supra, 739 F.2d at 642, have taken an approach that cannot be squared with the law of this Court.

C. The sum of the matter is this: those courts that have held that there is no right to a jury trial in a duty of fair representation case have taken a position that is entirely consistent with the decisions of this Court. In contrast, the position of the court below, and those other courts that have held duty of fair representation plaintiffs to be entitled to juries whenever they seek back pay, is inconsistent with this Court's precedents.

From its genesis in concerns over fiduciary responsibility to its modern characterization by this Court as analogous to an unfair labor practice, the fair representation claim is an equitable claim,

quite unlike any action at common law. To correct those courts that have erred on this important issue of federal labor law, and to bring clarity to an area of continuing importance to the federal courts, this Court should grant this petition for a writ of certiorari.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

Civil No. C-83-693-WS
[FILED November 10, 1987]

THOMAS C. TERRY, DAN FIELDS, JIM CROWE, KEITH BARKER, JAMES A. RICHARDS, DON WRIGHT DAVID L. GILTZ, DALE BISHOP, TONY BAITY, JAMES R. DAVIS, DON BRITT, LONNIE DAVIS, JIM WILSON, DAVID C. KING, DONALD E. HENDERSON, ARTHUR JARRELL, RON RAY, J. C. GREER GARY PEEBLES, HAROLD DYSON, ED STRANGE, SAM E. CALLAHAN, GEORGE C. BLANKENSHIP, JR., PAUL EMBRY, CLAYTON WORLEY, JOHN R. MARSHAL, AND ROBERT C. MUNSEY,

Plaintiffs,

v.

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 391; and McLEAN TRUCKING COMPANY, INC.,

Defendants.

MEMORANDUM OPINION

BULLOCK, District Judge

Plaintiffs, present and former members of Local 391, International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers of America, and former employees of McLean Trucking Company, Inc., have brought this action pursuant to Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, alleging breach of the collective bargaining agreement against McLean Trucking Company and breach of the duty of fair representation against the International Brotherhood of Teamsters of America and Local 391. Plaintiffs also allege that all Defendants were involved in a conspiracy to violate Plaintiffs' rights under the collective bargaining agreement. Plaintiffs seek declaratory and injunctive relief, compensatory damages, attorney's fees, and costs. Plaintiffs also demand a jury trial.

The court granted summary judgment in favor of the International Brotherhood of Teamsters of America, and this proceeding was stayed with respect to McLean Trucking Company upon McLean's filing of a petition in bankruptcy. Presently pending before the court is a motion to strike the Plaintiffs' jury demand filed by the remaining Defendant, Local 391.

The parties have submitted briefs and the court heard oral argument in conjunction with the final pre-trial conference on September 30, 1987.

This matter presents a close question concerning whether Plaintiffs are entitled to a jury trial for a Section 301/breach of duty of fair representation claim. The case law which has confronted the question directly is split, and some of the rationale for granting a jury trial may have been altered by the United States

Supreme Court's determination in United Parcel Service v. Mitchell, 451 U.S. 56 (1981), and DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), that such suits are not analogous to common law contract or tort actions.

Few circuit courts since the Supreme Court's rulings in Mitchell and DelCostello have approached the jury issue in fair representation actions, and the one which most closely addressed the issue ruled in favor of a jury. Quinn v. DiGiulian, 739 F.2d 637 (D.C. Cir. 1984).[1] The district court cases since 1983 are sharply divided, however, with some construing the Supreme Court decisions broadly and other following the narrower construction in Quinn. For

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[1]The Ninth Circuit also recently allowed a jury to resolve the question of liability in a hybrid Section 301 action where the claimants sought back compensation for sick leave. Zuniga v. United Can Co., 812 F.2d 443 (9th Cir. 1987).

the reasons set forth below, the court finds the latter position more persuasive, and therefore denies Defendant's motion to strike Plaintiffs' jury demand.

Defendant correctly points out that Section 301 does not provide an independent statutory right to a jury trial. The very general language of Section 301 merely grants jurisdiction in federal courts. Defendant also contends, however, that Plaintiffs' Section 301 claim is not an action "at common law" within the meaning of the seventh amendment[2] and therefore Plaintiffs are not entitled to a trial by jury. In support of this contention, Defendant notes the distinction drawn by the United States Supreme Court in Mitchell and DelCostello between "hybrid" Section

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[2]The seventh amendment provides in part: "In Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved...." U.S. Const. amend. 7.

301 claims and their common law components. In DelCostello, the Court reasoned that because the plaintiff in a Section 301/fair representation suit must demonstrate both the employer's contract violation and the union's breach of duty to prevail against either party, the two underlying claims are "inextricably interdependent." 462 U.S. at 164-65 (citing Mitchell, 451 U.S. at 66-67 [Stewart, J., concurring in judgment], quoting Hines v. Anchor Motor Freight, 424 U.S. 554, 570-71 [1976]). Consequently the hybrid cause of action is not equivalent to the standard common law contract or tort claim, but is a product of labor law which was not recognized at common law.[3] The

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. [3]Defendant contends that the weight of authority of lower court cases prior to Mitchell was against the right to a jury trial. See Nedd v. Thomas, 316 F. Supp. 74 (M.D. Pa. 1970), aff'd on other grounds, 556 F.2d 190 (3d Cir. 1977), cert. denied, United Mine Workers v. Nedd, 434 U.S. 1013 (1978); Brady v. Trans World Airlines, Inc., 196 F. Supp. 504 (D. Del. 1961),

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aff'd on other grounds, 401 F.2d 87 (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969). Defendant further argues that Mitchell and DelCostello swing the balance more in its favor by effectively overruling the prior cases which granted a jury trial. This overstates the significance of the Supreme Court rulings, however, because although the prior cases treated hybrid Section 301 claims like common law contract and tort actions they also took into account the type of remedies involved and the abilities of the jury in deciding that the seventh amendment applied. See Cox v. C. H. Masland & Sons, Inc., 607 F.2d 138 (5th Cir. 1979); Minnis v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 531 F.2d 850, 852-53 (8th Cir. 1978); Kinzel v. Allied Supermarkets, Inc., 88 F.R.D. 360, 362-64 (E.D. Mich. 1980).

The court also notes at the outset that although the Fourth Circuit has not addressed this issue directly it has permitted a jury trial as to the damage issue in an action against a union under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Sec. 401 et seq., Simmons v. Avisco, Local 713, Textile Workers of America, 350 F.2d 1012 (1965). The Fourth Circuit also tacitly acknowledged the right to jury trial in a fair representation action against a union. Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888 (4th Cir. 1980). The court granted defendant's judgment n.o.v. and new trial motions after the jury awarded plaintiff monetary damages but the court

Supreme Court's conclusion does not preclude applicability of the seventh amendment to such actions, however. The Court has clearly stated in other decisions that the seventh amendment embraces not only those causes of action which the common law recognized, but all suits "in which legal rights were to be ascertained or determined." Ross v. Bernhard, 396 U.S. 531, 533 (1970). The question is not whether the rights existed at common law or were created by statute, for it is well established that the seventh amendment "requires a jury trial upon demand" where a statute "creates legal rights and remedies, enforceable for damages in the ordinary courts of law." Curtis v. Loether, 415 U.S. 189, 194 (1974). Rather, the question is whether the rights plaintiffs assert in

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did not question the legality or propriety of the jury trial.

their hybrid Section 301 action are legal or equitable.[4]

On this point the Supreme Court's observation in DelCostello is not dispositive. In Ross the Court mentioned three factors for determining the legal nature of an issue, and the "pre-merger custom with reference to such questions" is only the first of these. 396 U.S. at 538 n. 10. Moreover, DelCostello merely implies that the common law did not speak to hybrid Section 301 claims, and does not say that

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[4]Plaintiffs' claim asserts a right created by statute. Although the duty of fair representation is not expressly included in the federal labor laws, the Supreme Court has found it to be an implicit obligation of exclusive bargaining representatives under both the Railway Labor Act, Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 202 (1944), and the National Labor Relations Act, Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953); Humphrey v. Moore, 375 U.S. 335, 342 (1964). The Supreme Court also authorized its enforcement in the federal courts in Vaca v. Sipes, 386 U.S. 171, 188 (1957).

they are equitable.[5] Whether a claim is legal or equitable for seventh amendment purposes depends also on "the remedy sought; and . . . the practical abilities and limitations of juries," Ross, 396 U.S. at 538 n.10, and in fact the Court has previously implied that the type of remedies involved is more important than whether the cause of action had a common law counterpart. Curtis, 415 U.S. at 195-96; see also Quinn v. DiGiulian, 739 F.2d at 646; Kinzel v. Allied Supermarkets, Inc., 88 F.R.D. at 362.

In addition to requesting reinstatement and other injunctive relief Plaintiffs seek punitive damages and other monetary relief for lost wages and health benefits and for mental and emotional distress. Because McLean has ceased operation and is

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[5]Defendant's contention to the contrary will be considered shortly herein.

not presently before this court, injunctive relief in the form of reinstatement is no longer possible. The current law also indicates that Plaintiffs' punitive damage claim may not lie against Local 391, Peterson v. Air Line Pilots Assn., International, 759 F.2d 1161, 1167 (4th Cir. 1985); see also International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 49-52 (1979) (Railway Labor Act); Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton, 377 U.S. 252, 260-61 (1964) (NLRA Sec. 303[a]).

The law is not clear as to whether lost wages constitute legal or equitable relief in Section 301 claims. The Supreme Court has recognized the inappropriateness of jury trials in Title VII actions, acknowledging circuit court decisions which denied jury trials where claimants sought reinstatement and back pay. See Great

American Federal Savings and Loan Ass'n v. Novotny, 442 U.S. 366, 375 (1979) (citing Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 [5th Cir. 1969]) (treating back pay as part of the statutory equitable remedy); Lehman v. Nakshian, 453 U.S. 156, 164 (1981). This position is based in large part on the language of Title VII, 42 U.S.C. Sec. 2000e-5(g), which "expressly authorizes only equitable remedies," Novotny, 442 U.S. at 375, see also Lorillard v. Pons, 434 U.S. 575, 584 (1978), and which leaves the awarding of back pay to the equitable discretion of the trial court. Lorillard v. Pons, 434 U.S. at 584 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 [1975]). In order to fashion appropriate relief within the constraints of Title VII, the Court has found back pay to be a "make-whole" remedy, not outside of equity. Albemarle, 422 U.S.

at 419-21. See also Robinson v. Lorillard, 444 F.2d 791, 802 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971).

Courts have treated actions under other statutes differently, however. In Lorillard v. Pons the Supreme Court distinguished the limiting language of Title VII from the broader remedial provisions of the Age Discrimination in Employment Act ("ADEA") which expressly permit recovery of "legal or equitable" relief. 29 U.S.C. Sec. 626(b), (c). The Court further reasoned that since the ADEA also incorporates the procedural aspects of the Fair Labor Standards Act ("FLSA"), and since Congress must have known that the FLSA has been interpreted to include jury trials, by providing for legal relief Congress must have intended to extend the right to a jury to ADEA actions. Id. at 582-83.

In addition, the Court observed that although the ADEA does not specify which types of relief are legal or equitable, since "employment, reinstatement or promotion are equitable . . . 'legal relief' must refer to" "unpaid minimum wages or unpaid overtime compensation" within the meaning of the FLSA. Lorillard v. Pons, 434 U.S. at 583 n.11. Since lost wages are the ADEA equivalent of unpaid minimum wages or unpaid overtime compensation, Pons v. Lorillard, 549 F.2d 950, 953 (4th Cir. 1977), aff'd, Lorillard v. Pons, 434 U.S. 575 (1978), the Supreme Court essentially agreed with the Fourth Circuit's ruling that for ADEA purposes lost wages, e.g., back pay, is traditional legal relief.

The status of lost wages under Section 301 is not as clear. Section 301 does not mention forms of relief, other than to say

that monetary damages cannot be recovered against individual union members. 29 U.S.C. Sec. 185(b). However, although Congress did not expressly provide for legal or equitable relief, legal relief has been granted in the past in the form of punitive damages against the employer or damages resulting from the wrongful conduct. Therefore Section 301 does not limit recovery to equitable remedies.

None of the circuit courts have directly confronted the question whether lost wages are equitable or legal in actions brought under Section 301. However, two circuit courts have apparently treated them as traditional legal remedies. Cox v. C. H. Masland & Sons, Inc., 607 F.2d at 142; Minnis v. International Union, etc., 531 F.2d at 852. Each of those cases involved discharged plaintiffs, and both ruled in favor of a jury trial for

plaintiffs' hybrid Section 301 claims. Neither court specified the relief sought but since the actions were for wrongful discharge it seems likely that the monetary damages sought at least partly represented wages lost as a result of the employer's actions.

This is supported by the Fifth Circuit's statement in Cox that plaintiff "seeks only monetary damages from each defendant, not arbitration or judicially-decreed reinstatement, remedies equitable in nature because they are in effect specific performance." 607 F.2d at 142. The court did not mention back pay or lost wages among the "remedies equitable in nature," nor is back pay a type of specific performance. Back pay represents wages plaintiff was deprived of the opportunity to earn, not money he actually worked for that was withheld from him. Therefore the

monetary recompense the Fifth Circuit called "the traditional common law remedy" probably included lost wages.

Similarly, in Minnis the plaintiff sought "a traditional legal remedy--compensatory and punitive damages." 531 F.2d at 852. Again in a discharge suit the plaintiff is unlikely to seek solely compensatory damages other than the back pay he was prevented from earning.

Even if the rulings in Cox and Minnis in favor of jury trials are called into question in light of Mitchell and DelCostello, because the former were based in part or treating the claims like common law contract or tort actions, the courts' classification of remedies has not been contravened. Absent contrary precedent regarding Section 301 and in light of both the availability of other legal relief under that section and the varying

treatment of back pay under other sections in the past, the court is persuaded that classification as legal relief is proper.[6]

Plaintiffs also seek reimbursement for medical expenses incurred at a time when, but for the union's alleged breach, they would have been employed, and McLean's health plan would have covered the cost. Such claims are comparable to lost wages, and are entitled to the same treatment.

Finally, Plaintiffs seek damages for mental and emotional distress, which is clearly legal relief. Therefore this action differs from those in which courts have denied jury requests because plaintiff sought only equitable relief. See, e.g., Griffin v. United States Postal Service, 635 F. Supp. 190, 193 (N.D. Ga. 1986); Spicuzza v. Ace Hardware Corp., No. C 82-1

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[6]Where the issue is unclear it should be resolved in favor of constitutionally protected rights.

(N.D. Ohio Jan. 15 1986).

In the alternative, Defendant also argues that the Supreme Court has treated Section 301/fair representation suits as predominantly equitable. Defendant refers to statements in both DelCostello and Mitchell that these suits are more analogous to actions to vacate arbitration decisions than they are to straight contract claims seeking damages. Mitchell, 451 U.S. at 62; DelCostello, 462 U.S. at 165. Defendant uses the Supreme Court's stated rationale, that the first step in Plaintiffs' claim involves the challenge to the finality of the arbitration ruling, to conclude that even if Plaintiffs state a claim for legal relief, that claim is secondary and incidental to the equitable relief of over-turning a prior decision.

Defendant also cites to the court two district court cases decided since

DelCostello which rely on such reasoning in granting the defendant's motion to strike plaintiffs' jury demand. Spicher v. Wilson Foods Corp., No. 85-1203, slip op. at 6 (C.D. Ill. Nov. 27, 1985); Harris v. Refiner's Transp. & Terminal Corp., No. C 84-7578, slip op. at 14 (N.D. Ohio Apr. 8, 1985). These cases conclude that "[b]ecause plaintiff is entitled to no relief unless the finality accorded the grievance process is set aside, the monetary request is . . . merely incidental to the primary relief sought." Harris, supra, at 14; see also Spicher, supra, at 6.

These cases overstate the Supreme Court's position. Both Mitchell and DelCostello involved the proper statute of limitations for filing a Section 301/fair representation claim. The court first decided in Mitchell that insofar as the

plaintiff's suit challenged the prior arbitration decision the three-month limitations period applicable to appeal of arbitration awards under state law was more appropriate than the six-year statute of limitations applicable to standard contract actions. 451 U.S. at 64. Then, in DelCostello, the Court held that neither option was suitable for Section 301/fair representation claims. Although such actions are more similar to challenges of commercial arbitration awards than to simple contract claims, the fact that the employee-plaintiffs are removed from the arbitration process requires that they be given more time after the award to vindicate their rights, 462 U.S. at 165-66.[7]

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[7]The DelCostello Court adopted the six-month period applicable to unfair labor practice actions brought before the National Labor Relations Board. While the Court considered fair representation

The Supreme Court's concern in both cases was the finality of arbitration decisions, not the applicability of the seventh amendment. The issue the Court faced was whether to allow a plaintiff to challenge the arbitration decision, not whether such challenge can be made before a jury. In the present case Plaintiffs filed this suit within the appropriate limitations period and their claims will be heard. The only question currently before this court is whether Plaintiffs are entitled to make their arguments to a jury, and on this point the Supreme Court has not spoken.

At least one circuit court agrees with

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actions to be closely related to unfair labor practice actions for this purpose, the Court expressly refrained from holding that they are equivalent. 462 U.S. at 170. Defendant's contention that, because unfair labor practice claims are not tried to a jury, the plaintiffs' claim should not be, is unpersuasive.

this analysis. In Quinn v. DiGiulian, supra, the Circuit Court of Appeals for the District of Columbia Circuit said that the DelCostello holding regarding statutes of limitations "offers little support for the . . . argument that [a fair representation] action is equitable in nature for seventh amendment purposes." 739 F.2d at 646.[8]

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[8]The court in Quinn went on to find that plaintiff's "action for damages for breach of the duty of fair representation is an action to enforce a legal right, and the plaintiff is entitled to a jury trial of that action." 739 F.2d at 646. Quinn involved only a fair representation claim, and not a hybrid Section 301, but two district courts have applied the holding in Quinn to a hybrid in ruling in favor of a jury trial. Cook v. National Maritime Union of America, 617 F. Supp. 1052 (S.D.N.Y. 1985); Emerick v. McConway & Torley Corp., 650 F. Supp. 545 (E.D. Pa. 1986); see also Grider v. Monin, 637 F. Supp. 324 (M.D. Tenn. 1986). The court finds the Quinn reasoning more convincing than the arguments in the cases offered by Defendant. Compare Spicuzza v. Ace Hardware Corp., No. C 82-1 (N.D. Ohio Jan. 15, 1986); Hampton v. Robertshaw Controls Co., Civ. 3-87-002 (E.D. Tenn. Apr. 23, 1987); McIntyre v. United Steelworkers of America, No. 85-258-Civ-3-16 (M.D. Fla. July 31, 1985).

Interestingly, Judge Contie's concurrence in Wood v. Teamsters Local 406, to which Defendant refers the court, also comments that Mitchell and DelCostello do not apply directly to the jury question in hybrid Section 301 claims. Nos. 85-1880/1963/1964, slip. op. at 22, n.1 (6th Cir. Dec. 15, 1986) (Contie, J., concurring). Judge Contie also contends that the underlying contract claim is triable to a jury, but the breach of duty of fair representation claim is not because it amount to an attempt to set aside the arbitration process. Therefore, the fair representation claim should be heard by the court before empanelling a jury. Id. In so arguing, Judge Contie essentially disregards the Court's holdings in DelCostello and Mitchell, with respect to treating the underlying claims as interdependent, and his position is

inconsistent with Defendant's contentions. Further, since the other two judges in Wood did not reach the jury issue, Id. at 19, n.3, the case provides no support for the Defendant's position.

This court in any event rejects the argument that Plaintiffs' damage claims against the union are incidental to the equitable objective of setting aside the arbitration decision. Plaintiffs' goal is not to overturn the Joint Bi-State Grievance Committee's arbitration ruling, and in light of McLean's present condition they certainly do not want another crack at arbitration. What Plaintiffs do want now is money to replace what they believe they lost because of the wrongdoing of their employer and their union, Local 391. Although to prevail Plaintiffs need to prove both the breach of contract and Local 391's breach of duty, if they do in fact

recover against the union it will be because Local 391 violated its duty, and not because the arbitration committee ruled incorrectly. Just as if the committee decided properly that McLean did not breach the contract, Local 391 would not be liable regardless of its conduct during the hearing, so also is Local 391 not liable regardless of the correctness of the arbitration ruling if the union represented the Plaintiffs fairly. See Bygott v. Leaseway Transp. Corp., 56 U.S.L.W. 2038 (3d Cir. June 25, 1987). Thus Plaintiffs' claim against the union for damages attributable to the breach of duty is no more incidental than their challenge of the arbitration committee's decision that McLean had not violated the agreement.

Moreover, even if the legal remedies sought were classified as "incidental" to the equitable relief, the Plaintiffs would

still be entitled to a jury determination of their legal claims. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 473 (1962), citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504, 510 (1959); Curtis, 415 U.S. at 196 n.11; Ross, 396 U.S. at 536-37.

Insofar as Plaintiffs' claim for lost wages and medical expenses constitute pleas for legal relief, and in light of Plaintiffs' mental and emotional distress claims, the second Ross standard counsels in favor of a jury trial of those issues.

Finally, although the practical abilities and limitations of a jury may be tested in this case, none of the courts which have commented on the third Ross standard have found the jury incapable of handling the suit, including all of the cases offered by Defendant. See, e.g., Spicher, supra, slip op. at 7; Kinzel, 88 F.R.D. at 364. The courts in both Curtis

and Quinn have noted the possibility of jury prejudice, however, and suggest that trial courts bear in mind their authority to grant directed verdicts and judgments notwithstanding the verdict. Curtis, 415 U.S. at 198; Quinn, 739 F.2d at 646.

Because Plaintiffs assert legal rights and seek legal remedies the seventh amendment grants them the right to a jury trial and Defendant's motion is denied.

In order to make the case more manageable for the jury, the court will bifurcate the action. Trial will proceed before the jury on the liability issue first, and if Defendant is found liable the court will then hold a separate trial on the issue of damages. Plaintiffs are entitled to have the same jury hear both the liability and damage issues.

An order consistent with this opinion will be filed contemporaneously herewith.

/s/ Frank W. Bullock, Jr.
United States District Judge

November 10, 1987

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
[FILED Dec 17 1987]
No. 87-8117

THOMAS C. TERRY; DAN FIELDS; JIM CROWE; KEITH BARKER; JAMES A. RICHARDS; DON WRIGHT; DAVID L. GILTZ; DALE BISHOP; TONY BAITY; DON BRITT; LONNIE DAVIS; JIM WILSON; DAVID C. KING; DONALD E. HENDERSON; ARTHUR JARRELL; RON RAY; J. C. GREER; GARY PEEBLES; HAROLD DYSON; ED STRANGE; SAM E. CALLAHAN; GEORGE C. BLANKENSHIP, JR; PAUL EMBRY; CLAYTON WORLEY; JOHN R. MARSHAL; ROBERT C. MUNSEY

Plaintiffs-Appellees

v.

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 391; and MCLEAN TRUCKING COMPANY, INC.

Defendants-Appellants

Appeal from the United States District Court
for the
Middle District of North Carolina
at Winston-Salem

Upon consideration of the petition for permission to appeal and interlocutory order, pursuant to 28 U.S.C. 1292(b),

IT IS ORDERED that the petition for permission to appeal is granted.

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3896

THOMAS C. TERRY; D. B. FIELDS; JIM CROWE; KEITH BARKER; JAMES A. RICHARDS; DON WRIGHT; DAVID L. GILTZ; DALE BISHOP; TONY BAITY; JAMES R. DAVIS; DON BRITT; LONNIE DAVIS; JIM WILSON; DAVID C. KING; DONALD E. HENDERSON; ARTHUR JARRELL; RON RAY; J. C. GREER; GARY PEEBLES; HAROLD DYSON; ED STRANGE; SAM E. CALLAHAN; GEORGE C. BLANKENSHIP, JR.; PAUL EMBRY; CLAYTON WORLEY; JOHN R. MARSHAL; ROBERT C. MUNSEY

Plaintiffs-Appellees

v.

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 391; McLEAN TRUCKING COMPANY

Defendants-Appellants

Appeal from the United States District Court for the Middle District of North Carolina, at Winston-Salem. Frank W. Bullock, Jr., United States District Judge. (CA-83-693).

Argued: Oct. 4, 1988 Decided: Dec. 20, 1988

Before SPROUSE, ERVIN and WILKINS, Circuit Judges

John David James (SMITH, PATTERSON, FOLLIN, CURTIS, JAMES & HARKAVY on brief) for Appellant. Robert Mauldin Elliot (PFEFFERKORN, PISHKO & ELLIOT, P.A. on brief) for Appellees.

SPROUSE, Circuit Judge:

This is an interlocutory appeal by the Chauffeurs, Teamsters & Helpers, Local 391 ("the Union") from the district court's order refusing to strike the jury trial demand of the plaintiffs, Thomas C. Terry and twenty-six other truck drivers (hereinafter "Terry"), holding that Terry was entitled under the seventh amendment to the United States Constitution to a jury trial of his hybrid § 301/duty of fair representation action, see Vaca v. Sipes, 386 U.S. 171 (1967), against his employer and the Union.[1] Terry v. Chauffeurs,

[1]The complaint also named the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Terry's employer, McLean Trucking Company, Inc., as defendants. The

Teamsters & Helpers, Local 391, 676 F.Supp. 659 (M.D.N.C. 1987). The district court certified its ruling under 38 U.S.C. § 1292(b), and we granted the Union's petition for an interlocutory appeal to consider this single issue.

The plaintiffs were all drivers employed by McLean Trucking Co., Inc. and living in locations other than Winston-Salem, North Carolina. They successfully "bid" on driver vacancies stated by McLean to exist in its Winston-Salem terminal but, after moving to that area, were alternatively employed and laid off. In his complaint, Terry alleges that McLean breached its collective bargaining agreement by manipulating recall procedures so as to give other drivers preferences over

district court granted the international union's motion for summary judgment. McLean has since filed a petition in bankruptcy, and Terry's action against it has been stayed.

him. He complains that he consequently sustained substantial loss of wages. He also alleges that the Union failed to fairly represent him in the grievance proceedings he pursued to rectify McLean's breach.

The Union presented Terry's grievances to the Eastern Conference Joint Area Committee, which had been created by the collective bargaining agreement between McLean and the Union. That Committee ordered McLean to adjust its layoff policy to comply with a Change in Operation Plan previously agreed upon between McLean and the Union. Terry claims that McLean thereafter engaged in a pattern of layoff and recall in order to circumvent this ruling, and he filed a second grievance, this time with the Joint Bi-State Grievance Committee. It was denied. Terry contends that the Union conspired with McLean and

acquiesced in its violation of his rights and in other ways breached its duty of fair representation in the grievance proceedings.

In his complaint filed in the district court, Terry first demanded a declaratory judgment that McLean and the Union acted unlawfully and violated his rights under the law and under the collective bargaining agreement. He also demanded a permanent injunction ending the alleged violations and directing McLean to place him in his proper seniority position. In addition, he requested compensatory and punitive damages, attorneys' fees, and costs.

I

General seventh amendment jurisprudence is well-settled. Thus, only a brief summary is necessary to consider its application to the hybrid § 301/duty of fair representation action.

The seventh amendment to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Supreme Court, of course, has long recognized that the protection provided by this language extends well beyond the common-law forms of action existing in 1791. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830). Briefly stated, the Court in Parsons held that the seventh amendment applies in all suits which are in the nature of a suit at common law. Any uncertainty concerning the application of the rule to "mixed" suits of law and equity was resolved by Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), decided after the merger of law and equity in the Federal Rules of Civil Procedure. See Fed.

R. Civ. P. 2; see also Rules Enabling Act of 1934, ch. 651 § 2, 48 Stat. 1064. The Court there held "that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." 359 U.S. at 510-11 (footnote omitted). It therefore required that in "mixed" cases, in the absence of irreparable harm to the plaintiff seeking equitable relief, the legal issues should be tried to a jury before the court ruled on equitable claims. Id. at 506-07, 510.

Since Beacon Theatres, the Court has reemphasized that the presence of an equitable claim or a request for an equitable remedy should not prevent legal issues or remedies from going to a jury. In Dairy Queen, Inc. v. Wood, 369 U.S. 469

(1962), the Court made clear that a trial court must independently determine whether the essential nature of the claim for relief was legal or equitable regardless of the "choice of words used in the pleadings." Id. at 478. In Ross v. Bernhard, 396 U.S. 531 (1970), the Court divided an action which traditionally was primarily equitable into its legal and equitable components. In that shareholder's derivative action, the Court held:

> where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims. The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.

Id. at 537-38. The Court in Ross formulated a test for determining the legal nature of an issue which required the lower court to consider "first, the pre-merger

custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." Id. at 538 n. 10.

The Court also applied this constitutionally mandated preference for jury trial in the context of rights created by statute. In Curtis v. Loether, 415 U.S. 189 (1974), it stated:

> when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.

Id. at 195.

II

The Union contends that only equitable issues are presented in this hybrid § 301/duty of fair representation case, and, therefore, Terry has no constitutional right to a trial by jury. In support of

this contention, the Union argues because the Supreme Court in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981), and DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), stated that there was no precise analogy to the hybrid action in the common law, the action must be considered essentially equitable in nature. Terry, however, stresses the second factor of the Ross test and urges that the issues framing the action and the remedies flowing from them vel non must be examined individually in determining whether the underlying issues are legal or equitable--that "[t]he Seventh Amendment protection depends on the nature of the issue to be tried rather than the character of the overall action." Ross, 396 U.S. at 538.

In both Mitchell and DelCostello, the Court faced the problem of which statute of

limitations applied to hybrid § 301/duty of fair representation actions. In Mitchell, the Court considered the choice of New York's ninety-day limit for challenging an arbitration decision or its six-year limit for breach of contract actions. In rejecting the six-year period, the Court noted that an "indispensable predicate" for a hybrid action was a demonstration that the union had breached its duty of fair representation in the grievance or arbitration hearing. 451 U.S. at 62. Only on such a showing could the otherwise final and binding arbitration decision be set aside and the issue of the breach of a collective bargaining agreement be reopened and tried in the courts. Therefore, finding that these peculiar requirements of a hybrid action made the claim "more a creature of 'labor law' ... than ... of general contract law" and that labor policy

required a "'relatively rapid disposition of labor disputes,'" the Court chose to borrow the shorter period provided by New York's arbitration statute of limitations. Id. at 63.

In DelCostello, the Court reconsidered the rationale underlying the application of the statute of limitations to a hybrid § 301/duty of fair representation action. It said:

> Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the Union is one for breach of the Union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. "Yet the two claims are inextricably interdependent." ... Mitchell [451 U.S.] at 66-67 (Stewart, J., concurring in judgment) ... [Such an action] has no close analogy in ordinary state law. The analogies suggested in Mitchell both suffer from flaws, not only of legal substance, but more important, of practical application in view of the policies of federal labor law and the practicalities of hybrid § 301/fair

representation litigation.

462 U.S. at 164-65 (footnote omitted).

While continuing to hold that the hybrid action was closer to an action to vacate an arbitration decision than to a breach of contract action, the Court in DelCostello recognized that this analogy too was imperfect and noted that for practical reasons the state limitations periods for challenging arbitration decisions were too short and "fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights." Id. at 166. It noted that "the closest state-law analogy" was a legal malpractice action, as if the union were "a lawyer who mishandles a commercial arbitration." Id. at 167.

The Court decided, however, that the malpractice analogy was not responsive to policies underlying the application of

statutes of limitations in this labor-law context. It reasoned that under Vaca v. Sipes, 386 U.S. 171 (1967), and Bowen v. United Parcel Service, 459 U.S. 212 (1983), the union was only responsible for increases in a plaintiff's damages caused by its breach of duty. Thus, a malpractice statute of limitations would only provide that greater time period for the union's portion of the damages. The employer, protected by the short limitations period designed for challenges to arbitration decisions, might escape responsibility for its large portion of the damages unless the employee managed to file his claim within that short period. Finally, finding no adequate analogy in state law, the Court resorted to the six-month period for making charges of unfair labor practices under § 10(b) of the National Labor Relations Act as the closest and most just analogy.

In Quinn v. DiGiulian, 739 F.2d 637 (D.C. Cir. 1984), the D.C. Circuit held that DelCostello had no application to an issue of the right to trial by jury. In its view, the Supreme Court's holding that the hybrid action had no close analogy to ordinary state tort or contract actions did not resolve the legal/equitable determination necessary for seventh amendment analysis. Further, the D.C. Circuit astutely observed that "the nature of the remedies authorized and sought has become a more reliable clue to whether the action is legal or equitable in nature than the existence of a precise common law analogy to the modern cause of action." id. at 646 (citing Curtis, 415 U.S. at 196-97). Contra Leach v. Pan American World Airways, 842 F.2d 285 (11th Cir. 1988) (holding that the DelCostello rationale foreclosed the seventh amendment issue).

Although analogies to state-law actions are helpful in seventh amendment analysis, the absence of a single clear analogy does not preclude a determination that a statutory action involves "rights and remedies of a sort typically enforced in an action at law." Curtis, 415 U.S. at 195. Beacon Theatres, Dairy Queen, and their progeny instructed the district courts to ensure that all issues of fact inherent in any legal claims be tried to a jury before the Court resolved any remaining factual issues raised by equitable claims. Ross and Curtis made clear that the nature of the claims and remedies determine whether a right to a jury trial is present, not the overall nature of the action.

Making a law/equity determination for seventh amendment purposes is a far different task than choosing a statute of

limitations in a labor-law context. While the hybrid action we consider is the same kind of action the Supreme Court considered in Mitchell and DelCostello, there is no need for us to treat the hybrid action as an indivisible whole when performing a seventh amendment analysis. Indeed, the Beacon Theatres line of cases instructs us to do just the opposite.

III

We do not think it practical to resolve the legal/equitable dichotomy in this labor-law context with a bright-line rule. As the Supreme Court cogently recognized in both Mitchell and DelCostello, actions to enforce rights under the Labor Management Relations Act (hereinafter "LMRA"), 29 U.S.C. § 141, et seq., and other labor-law statutes do not neatly fit any mold of traditional common-law actions. Therefore, we must analyze

the issues and remedies in each hybrid case.

Terry asks for declaratory judgment, injunctive relief, and monetary relief. The part of this action seeking injunctive relief against McLean has been mooted by McLean's bankruptcy. The questions of declaratory and injunctive relief against the Union, however, are still viable. The demand for injunctive relief raises equitable issues. Resolution of the declaratory relief demand, however, raises legal issues that may well require both a determination by the court of the meaning of the collective bargaining agreement and a resolution by the jury of disputed facts concerning whether that agreement was breached. Both the interpretative issues that the court must determine in this context and the factual issues that the fact finder must resolve relate to the

resolution of legal issues.

It is true that claims for back wages in other type actions have been characterized variously both as legal and equitable in nature.[2] If Congress had specifically classified backpay as an equitable remedy in the LMRA, there would be, of course, no jury trial right question. In enacting the

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[2] Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (cited with approval in Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 375 (1979)) states that back pay in Title VII of the Civil Rights Act of 1964 cases is an equitable remedy. This holding, however, is based in large part on the specific language of Title VII, which expressly authorizes only equitable remedies. See 42 U.S.C. § 2000e-5(g). In Lorillard, Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575, 584 (1978), however, the Supreme Court distinguished the Title VII cases from cases arising under the provisions of the Age Discrimination in Employment Act. 29 U.S.C. § 621, et seq. The latter statute specifically permits recovery of legal or equitable relief, 29 U.S.C. § 626(b), (c) (1985), and expressly incorporates the procedural aspects of the Fair Labor Standards Act, 29 U.S.C.A. §§ 216, 217 (1965 & West Supp. 1988) under which there is a right to a jury trial. See 434 U.S. at 580.

LMRA, however, Congress did not expressly provide for either legal or equitable relief, and backpay, as a form of money damages, may appropriately be considered legal in nature. Thus, although a § 301 action to remedy a violation of a collective bargaining agreement has no counterpart in common law, in our view, the claims for damages asserted here involve legal issues, and, like the Supreme Court in Curtis, we find no functional justification for denying the jury-trial right. See 415 U.S. at 195.

We review the duty of fair representation increment of the hybrid action in the same light. Like its § 301 sibling, it is derived from congressional enactment, albeit by judicial interpretation of the statute. See, e.g., Vaca, 386 U.S. at 177. Further in DelCostello, the Supreme Court noted that "the closest state-law analogy"

to this action is a state tort malpractice action. 462 U.S. at 167. In our view, this component of the action is also legal in nature.

As we have indicated, we are unable to structure a bright-line rule stating which specific issues in hybrid § 301/duty of fair representation cases are subject to the seventh amendment requirement of a jury trial. We hold instead that, although many aspects of this action are intertwined, presenting both equitable and legal issues, either party is entitled to a jury trial of identifiable legal issues. We think the dictates of Beacon Theatres, Dairy Queen, and Curtis require that result and that Mitchell and DelCostello did not sequester these hybrid cases from this general body of law.

There being both equitable and legal issues present in this case, the district

court correctly upheld Terry's right to a jury trial on the issues of declaratory judgment relief and damages. Its decision is therefore affirmed.

AFFIRMED.

Supreme Court, U.S.
FILED
MAY 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1719

(2)

In The

Supreme Court of the United States

October Term, 1988

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL NO. 391,

Petitioner,

v.

THOMAS C. TERRY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 88-1719

In The

Supreme Court of the United States

October Term, 1988

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL NO. 391,

Petitioner,

v.

THOMAS C. TERRY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR DENYING THE WRIT

I. THE WEIGHT OF AUTHORITY AMONG THE CIRCUITS IS IN FAVOR OF THE RIGHT TO A JURY TRIAL IN DUTY OF FAIR REPRESENTATION SUITS AGAINST UNIONS WHEN LEGAL RELIEF IS SOUGHT.

In this Court's decisions discussing the constitutional right to a jury trial, *Ross v. Bernhard*, 396 U.S. 351 (1970),

and *Curtis v. Loether*, 415 U.S. 189 (1974), the Court articulated standards to determine a litigant's right to a jury trial under the Seventh Amendment of the United States Constitution. *See* discussion in Part II, *infra*. While there has been some divergence in applying these standards to duty of fair representation cases, the decided balance of lower court opinions is consistent with and supportive of the decisions of the United States District Court and United States Court of Appeals for the Fourth Circuit in this case, *Terry v. Chauffeurs, Teamsters & Helpers Local 391*, 676 F.Supp. 659 (M.D.N.C 1987), *aff'd* 863 F.2d 334 (4th Cir., 1988). *See, e.g., Minnis v. International Union*, 531 F.2d 850 (8th Cir. 1975); *Cox v. H. Masland & Sons, Inc.*, 607 F.2d 138 (5th Cir. 1979); *Smith v. Hussman*, 619 F.2d 1229 (8th Cir. 1980); *Quinn v. DiGiulian*, 739 F.2d 637 (D.C. Cir. 1984); *Wood v. Teamsters*, 565 F.Supp. 1011 (W.D. Mich. 1983) *reversed on other grounds*, 807 F.2d 493 (6th Cir. 1986); *Cook v. National Maritime Union of America*, 617 F.Supp. 1052 (S.D.N.Y. 1985); *Palmer v. Metro-North Commuter R.Co.*, 661 F.Supp. 1178 (S.D.N.Y. 1987); *White v. Anchor Motor Freight*, 683 F.Supp. 1177 (W.D.Mich. 1988); *Woods v. Dunlop Tire Co.*, 673 F.Supp. 117 (W.D.N.Y. 1987); *Grider v. Monin*, 637 F.Supp. 324 (M.D. Tenn. 1986).

The petitioner contends that there is an even split among four of the circuits with respect to this issue, disregarding the Eighth Circuit opinion in *Minnis* and the Fifth Circuit opinion in *Cox*. Acknowledging these contrary decisions, petitioner argues that because these cases were decided prior to this Court's decisions in three duty of fair representation cases, they should not be considered current representations of the views of their respective circuits. *See United Parcel Service v. Mitchell*, 451 U.S. 56 (1981); *Bowen v. United States Postal Service*, 459 U.S. 212 (1983); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983); and Petition, p. 12,n.3. However,

as both courts below in this case have pointed out, the petitioner greatly overstates the significance of the above three decisions, none of which involve the question presented in this case.

Thus, the Fourth Circuit's analysis in this case is consistent with most of the circuits which have ruled on this issue. And the circuits which have diverged did so in cases in which the plaintiffs were seeking primarily equitable relief which, under the application of the *Ross* test, would dictate a contrary conclusion. *See Leach v. Pan American World Airways*, 842 F.2d 285, 288 (11th Cir. 1988) (where the Court of Appeals for the Eighth Circuit pointed out that the Complaint sought only equitable relief); and *Deringer v. Columbia Transportation Div.*, 866 F.2d 859, 862-3 (6th Cir. 1989) (where the Court emphasized that it was not "establishing a per se rule [denying jury trials] for all such . . . suits," and pointed out that there was no demand for legal relief against the union).

Accordingly, any inconsistent decisions among the circuits, when considered in the contexts of the facts of the specific cases, seem to be more a result of differences in the relief demanded than in the application of the Seventh Amendment analysis under *Ross v. Bernhard*.

II. THIS COURT'S INTERPRETATION OF THE SEVENTH AMENDMENT SUPPORTS THE PLAINTIFFS' RIGHTS TO A JURY TRIAL IN THIS DUTY OF FAIR REPRESENTATION CASE.

As the Fourth Circuit pointed out at some length in its opinion in this case, this Court's analysis in recent

Seventh Amendment cases clearly supports the respondents' right to a jury trial. Specifically, in *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc., v. Wood*, 369 U.S. 469 (1962); *Ross v. Bernhard*, 396 U.S. 531 (1970); and *Curtis v. Loether*, 415 U.S. 189 (1974), this Court established clear principles which guide the application of the Seventh Amendment in the present context. First, in *Beacon Theaters* and *Dairy Queen*, it was emphasized that the procedural changes which came about with the enactment of the Federal Rules of Civil Procedure permitted a flexibility which had never existed, and which eliminated much of the "jurisdictional competition" between law and equity. This had the effect of eliminating the inadequacy of traditional equitable jurisdiction. Accordingly, if there are mixed issues common to equitable and legal claims, such issues should be tried by a jury, if properly demanded, except "under the most imperative circumstances" which the Court implied would be difficult, if not impossible, to show. *Beacon Theaters*, 359 U.S. at 511. Second the determination of the "legal" nature of a claim for Seventh Amendment purposes, should not be dependent on a semantical characterization of the overall action in traditional equitable terms, the procedural form which the action takes, or even on the primary remedy sought. Rather, the focus should be on the nature of specific underlying issues and consideration of all of the remedies to which the plaintiff may be entitled in his action. Thus, historically equitable actions, such as derivative stockholders' claims, are now triable by a jury, if they include underlying issues based on contract, tort or other legal relief sought. *Ross, supra.* Finally, in accordance with the strong preference voiced

by the Court for the Seventh Amendment, if there is any question, all doubts should be resolved in favor of a litigant's constitutional right to a jury trial.

In *Ross*, these principles emerged in a three-part test designed to determine whether the issue to be decided is a "legal" issue or "equitable" issue: (1) the pre-merger custom in regard to the issue (in law or equity); (2) the remedy sought by the plaintiffs; and (3) "the practicable abilities and limitations of juries." *Ross*, at 538, n. 10. In *Curtis* the Court, in strong terms, "dispelled" "[w]hatever doubt may have existed;" holding the Seventh Amendment applicable to all "actions enforcing statutory rights," and requiring a jury trial "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." 415 U.S. at 194. The Court found that the plaintiff's action was a "legal action" under the Seventh Amendment requiring a jury trial, finding parallels for the housing discrimination claims in that case in traditional common law torts. *Id.*, at 196-7.

In this duty of fair representation case, the lower courts correctly applied the *Ross* test. The respondents are invoking a statutory remedy under 29 U.S.C. Sec. 185, which was first recognized and later developed by the Supreme Court and which has close analogues in common law contract and tort. Since they are pursuing a legally enforceable right, they are entitled to the protection of the Seventh Amendment. Second, the respondents both in their pleadings and in fact are demanding primarily legal relief. As this Court has held in *Lorillard v. Pons*, 434 U.S. 575 (1978), back wages which the plaintiffs were

deprived of earning as a result of the defendant's unlawful conduct, are generally considered legal relief, unless the pertinent statute provides otherwise. Finally, as the lower courts observed, there can be little question that a jury is capable of deciding the factual issues in this case, particularly since the issues of liability and damages have been bifurcated. Petition, p. A-28.

CONCLUSION

For the reasons stated above, the respondents respectfully submit that the Petition for Writ of Certiorari in this case should be denied.

This the 22nd day of May, 1989.

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(3)

No. 88-1719

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL NO. 391,
Petitioner

v.

THOMAS C. TERRY, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 18, 1989
CERTIORARI GRANTED JUNE 19, 1989

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Note: The following items are contained in the Appendix to the Petition for a Writ of Certiorari:

Memorandum Opinion of District Court Denying Motion to Strike Plaintiffs' Jury Trial Demand, filed Nov. 10, 1987	Pet. App. A-1
Order of the U.S. Court of Appeals for the Fourth Circuit, filed Dec. 17, 1987	Pet. App. A-30
Opinion of the U.S. Court of Appeals for the Fourth Circuit, filed Dec. 20, 1988	Pet. App. A-31

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 25, 1983—Complaint filed in U.S. District Court for the Middle District of North Carolina.

August 3, 1983—Plaintiffs' Amended Complaint filed with District Court.

September 21, 1983—Answer of Defendant Chauffeurs, Teamsters and Helpers Local 391 to Plaintiffs' Amended Complaint filed with District Court.

January 6, 1986—Motion of Defendant Chauffeurs, Teamsters and Helpers Local 391 to Strike Plaintiffs' Jury Trial Demand filed with District Court.

February 18, 1986—Plaintiffs' Response to Motion to Strike Jury Trial Demand filed with District Court.

November 10, 1987—Memorandum Opinion and Order of District Court Denying Motion to Strike Plaintiffs' Jury Trial Demand.

December 17, 1987—Order of the U.S. Court of Appeals for the Fourth Circuit allowing Defendant permission to appeal pursuant to 28 U.S.C. § 1292(b).

January 4, 1988—Motion of Defendant to Strike Plaintiffs' Damage Demands for punitive damages and damages for emotional injury filed with District Court.

January 19, 1988—Plaintiffs' Response to Defendant's Motion to Strike Damage Demands filed with District Court.

December 20, 1988—Opinion and Judgment of the Court of Appeals for the Fourth Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

C-83-693-WS

THOMAS C. TERRY, and others similarly situated as set forth on Exhibit A,

Plaintiffs

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL 391; and MCLEAN TRUCKING COMPANY, INC.,

Defendants

COMPLAINT

[Filed July 25, 1983]

NOW COME plaintiffs, Thomas Terry, and others similarly situated, through counsel and allege and say:

JURISDICTION

1. This is an action for declaratory and injunctive relief, damages and back pay under the terms of the Labor Management Relations Act of 1947, as amended, (hereinafter "the Act") 29 U.S.C. §§ 141 *et seq* and 159 (a) and the Labor Management Reporting and Disclosure Procedure Act of 1959 (hereinafter "LMRDA"), 29 U.S.C. §§ 401 *et seq*.

2. This Court has jurisdiction of the controversy pursuant to 29 U.S.C. §§ 185 and 412, U.S.C. §§ 1337, 2201, and 2202 and the doctrine of pendent jurisdiction.

3. The unlawful employment practices complained of below were and are being committed within the Middle District of the State of North Carolina.

PARTIES

4. Plaintiff Thomas Terry is a citizen and resident of Forsyth County, North Carolina.

5. Each of the other named plaintiffs listed on the attached Exhibit A are also citizens and residents of the Middle District of North Carolina.

6. The defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America; and Chauffeurs, Teamsters, and Helpers Local 391, is a labor organization representing employees in an industry affecting commerce as defined in Sections 501(1) and (3) and 101(5) of the Act, 29 U.S.C. §§ 142(1) and (3), 152(5), and within the meaning of Section 301 of the Act, 29 U.S.C. §§ 185 and Section 3(c), (i) and (j) of the LMRDA, 29 U.S.C. § 402(c), (i) and (j).

7. The defendant, McLean Trucking Company, Inc. is a corporation organized and existing under the laws of the State of North Carolina and as at the time of the events complained of herein, and is presently engaged and doing business in the State of North Carolina with its principal place of business in Winston-Salem, North Carolina. The defendant is engaged in the business of interstate transportation of goods by truck and is an employer in an industry affecting commerce as defined by Sections 501(1) and (3) and 101(2), (6) and (7) of the Act, 29 U.S.C. §§ 142(1) and (3), 152(2), (6) and (7) and within the meaning of Section 301 of the Act, 29 U.S.C. § 185, and Section (3)(c) and (e) of the LMRDA, 29 U.S.C. § 402(c) and (e).

8. Plaintiffs were at all times complained of herein and presently are members in good standing of defend-

ant Local 391 and employees of the defendant McLean Trucking Company, Inc.

AGREEMENTS BETWEEN THE PARTIES

9. The defendants are signatories to and otherwise bound by a collective bargaining agreement entitled The National Master Freight Agreement together with the Carolina Freight Council Over-The-Road Supplement Agreement (March 1, 1982 through March 31, 1985). Each of these agreements was entered into by the Local for the benefit of its members. Plaintiffs, as members of the local union are entitled to the benefit of these agreements and to enforce the provisions thereof.

FIRST CAUSE OF ACTION

10. The matters and things complained of by the defendants are fully set forth in a letter dated April 14, 1983, from Thomas C. Terry, on behalf of all of the plaintiffs herein, to Mr. Roy Williams, General President of the National Grievance Committee and Mr. Arthur Bunte, Jr., employer chairman of the National Grievance Committee. That letter and each and every subparagraph thereof are incorporated by reference in this Complaint as if fully set forth. The letter is attached hereto as Exhibit B.

11. The defendant union, in breach of its statutory duty to represent the plaintiffs, conspired with the company to permit the decision of January 24, 1983, and the later actions of the company to stand. Upon information and belief it was agreed between the defendants that the actions of the company would not be opposed and that no action would be taken by the union to compel arbitration or otherwise contest the unlawful decisions and actions of the company.

12. By their failure to act on plaintiffs' behalf when requested to do so, and by their perfunctory and inadequate actions taken, the defendant unions have violated

their duty of fair representation of plaintiff and have arbitrarily discriminated, and in bad faith deprived them of their contract employment rights.

13. Defendant McLean Trucking Company violated the terms and provisions of a collective bargaining agreement, specifically Article 8 in connection with their change of operations and driver layoffs as more fully set forth in the attached Exhibit B.

14. As a result of the actions and omissions of the defendants, plaintiffs have suffered severe and substantial damages including loss of wages, moving expenses, future loss of wages, all in an amount to be shown at trial.

WHEREFORE, plaintiffs pray the Court that it issue a declaratory judgment that actions of defendants are unlawful and wrongful, award them compensatory damages, issue a permanent injunction enjoining future violations, award plaintiffs a reasonable attorney fee, tax the cost to the defendants, and for such other and further relief as the Court may seem just and proper. Plaintiffs demand trial by jury.

This the 25th day of July, 1983.

/s/ Jim D. Cooley
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David L. Giltz
P.O. Box 1335
Winston-Salem, N.C. 27102

Dale Bishop
Box 68
Welcome, N.C. 27374

Tony Baity
511 Duke Street
Thomasville, N.C. 27360

James R. Davis
Route 1 Box 499 Lot 2
Pleasant Garden, N.C. 27313

Obie Ballard
2126 Old Hollow Road
Walkertown, N.C. 27051

Don Britt
Route 5 Box 83
King, N.C. 27021

Clyde Osburn
1750 Nova Lane
Poland, Ohio 44514

Lonnie Davis
1991 W. Clemmonsville Rd.
Winston-Salem, N.C. 27107

Jim Wilson
6087 Belews Creek Road
Walkertown, N.C. 27051

Joseph Beck
106 Shenandoah Drive
Winston-Salem, N.C. 27103

David C. King
2080 Meadowglen Lane
Winston-Salem, N.C. 27107

Donald E. Henderson
2114 Elbon Drive
Winston-Salem, N.C. 27107

Arthur Jarrell
Route #1 Box 144
Little Brook Drive
Tobaccoville, N.C. 27050

Dan Fields
Box 12276
Winston-Salem, N.C. 27107

Ronald F. Ray
142 Duesberry Drive
King, N.C. 27021

Jon Miller
Route #1 Box 30
Harrisville, Pa. 16038

Thomas Terry
Box 12688
Winston-Salem, N.C. 27117

J.C. Greer
Route 2 Box 3
Arcadia M.H.E.
Clemmons, N.C. 27012

Gary Peebles
318 Mountain Brook Drive
King, N.C. 27021

Harold Dyson
Box 633
Walkertown, N.C. 27051

Ed Strange
Box 6084
Charlottsville, Va. 22906

Sam E. Callahan
Route 1 Box 477
Stuarts Draft, Va. 24477

George C. Blankenship, Jr.
Route 1 Box 294-B
Stanton, Virginia 24401

Paul Emory
(No Address)

Clayton Worley
Box 1974 Cartwright Drive
Kernersville, N.C. 27284

John R. Marshall
Box 282 Bedford Hill
Earlyville, Virginia 22936

John Blalock
Route 1
Raphine, Virginia 24472

Robert C. Munsey
Highway 710
Fairfield, Virginia 24435

EXHIBIT B

April 14, 1983

Mr. Roy Williams, General President of the National Grievance Committee International Brotherhood of Teamsters 25 Louisiana Ave, N.W. Washington, D.C. 20001

Mr. Arthur Bunte, Jr. Employer Chairman, National Grievance Committee 1050 17th St., N.W. Washington, D.C. 20036

Re: Case No. R-21-83
and Grievance of James
E. Wilson, Donald E.
Henderson, Sam Callahan,
C. C. Worley and other
affected employees
of McLean Trucking Company
(Filed February 28, 1983)

Gentlemen:

On January 24, 1983 the Eastern Area Joint Conference Change of Operations Committee rendercd a decision in Case No. R-21-83, a copy of which is attached to this letter. Subsequently the company, with the acquiescence of Local 391, has acted to circumvent the decision of the Committee. The relevant facts are as follows:

1. The grievants are all redomiciled drivers pursuant to the company's Change of Operations which was effective October 10, 1982.

2. Each of the grievants bid on the Winston-Salem jobs on August 29, 1982, after having been informed by the company that there were One Hundred Forty-Five (145) active drivers at Winston-Salem.

3. Sixty-two (62) drivers were added to Winston-Salem as a result of the change of operations; however,

when the Sixty-Two (62) redomiciled drivers arrived in Winston-Salem they found One Hundred Eight-Five (185) drivers on the active list. With the addition of the Sixty-Two (62) redomiciled drivers, there were then, effective October 19, 1982, Two Hundred Forty-Seven (247) active drivers.

4. On November 23, 1982 Thirty (30) redomiciled drivers were placed on layoff, leaving a total of Two Hundred Seventeen (217) active drivers. The next day a grievance was filed by these drivers which resulted in the decision in Case No. R-21-83 on January 24, 1983.

5. Prior to the decision on the grievance the company brought an additional Twenty-Five (25) drivers back to work from layoff status. These were all drivers who had been on the Winston-Salem inactive list as of October 10, 1982, and were not part of the One Hundred Eighty-Five (185) who were active at the time the Change of Operations went into effect. They were brought back during the period of time from approximately December 4 to December 7, 1982, making a total of Two Hundred Forty-Two (242) active drivers. On January 7, 1983, prior to the Committee's decision in Case No. R-21-83, an additional Twenty (20) drivers, most of whom were redomiciled drivers, were placed on layoff.

6. On February 4, 1983 the Company set out to "comply" with the decision in Case No. R-21-83. By February 7, 1983 it had recalled all of the Thirty-Six (36) redomiciled drivers who had been placed on layoff either on November 23, 1982 or January 7, 1983 and who had not yet been recalled. At the same time it placed on layoff the Thirty (30) drivers who had been on the inactive list as of October 10, 1982 but who had been called back since that time.

7. Effective February 8, 1983 all Thirty (30) Winston-Salem drivers who had been laid-off on the previous day were called back to work. Most did not even receive their

notice of layoff from the previous day before receiving notice of recall, and none of them missed any time from work whatever. Grievants contend that the company had allowed the work to build up during this period of time in order to be able to call this number of drivers back within a two-day period.

8. It was obvious during this entire period of time that there were more drivers called back to work than there was work to be done or equipment to operate. Subsequently, on February 26, 1983 Twenty (20) drivers (all of whom were redomiciled drivers under the October 10 change of operations) were laid off. None of the Thirty-One (31) Winston-Salem drivers who had been recalled on February 8, 1983 were placed on layoff. Afterwards ten (10) drivers (all redomiciled drivers) were layed off on March 5, 1983; they were called back on March 19, 1983.

Grievants contend that the company recalled the Thirty (30) drivers on February 8, 1983 as a subterfuge to avoid and circumvent the decision of the Change of Operations Committee in Case No. R-21-83. At the time they were called back, the Thirty (30) drivers had more seniority than the redomiciled drivers. By being called back on February 8 for "regular work", the Thirty (30) drivers were, in effect, permitted to regain their place on the active list ahead of the redomiciled drivers. The redomiciled drivers subjected to layoff on February 26, 1983 filed a grievance on February 28, 1983 which was scheduled, improperly, for a hearing before the Joint Bi-State Grievance Committee in Myrtle Beach, South Carolina on March 16, 1983. A copy of the grievance is attached. At that meeting grievants Terry and others were present and presented a letter addressed to Business Agent C. S. Williams dated March 14, 1983. They requested that since the Union had a clear conflict between the interest of one group of its members and themselves, they permitted to bring independent counsel

with them to represent their interests. This request was denied. A copy of the letter which was presented to the Committee is attached. Thereafter, grievant Terry sought to ask questions of business agent Williams concerning the Union's acquiescence in the company's recall of the Thirty (30) Winston-Salen drivers who were inactive as of October 10, 1982 but who were recalled, laid off and then recalled in the sequence set forth above. He was not permitted to ask any questions. The committee then voted to deny the grievance. A copy of the letter to grievants notifying them of this decision is attached.

The matter which the Union presented to the Joint Bi-State Grievance Committee and which that committee decided adversely to the grievants was a matter *solely* for the Change of Operations Committee pursuant to Article 8, Section 6 of the National Master Freight Agreement. Undersigned grievants thereafter requested that the Area Change of Operations Committee review the matter and declare the decision of the Joint Bi-State Grievance Committee null and void for lack of jurisdiction. They further requested that their letter be accepted as a statement of grievance on their behalf and on behalf of other affected redomiciled employees at the Winston-Salem facility and that the matter be scheduled for hearing at the next meeting of the Change of Operations Committee. Grievants further requested that they be permitted to present their position through independent counsel at that hearing since it was clear that there was (and still is) a conflict of interest between themselves and another group of employees who were also members of Local 391. Finally, grievants requested that they be provided with a copy of the Rules of Procedure adopted by the National Grievance Committee pursuant to Article 8, Section 6, Paragraph (b) and any side or supplemental agreements to the National Agreement which were relevant to this matter.

By letter dated April 1, 1983 from James H. Hutchinson, Jr. and Joseph W. Burkhard, Employer and Union Co-Secretaries, respectively, for the Eastern Conference, the Charge of Operations Committee refused to review the matter and determined that the decision of the Bi-State Committee was "final and binding." A copy of the letter is attached. The National Grievance Committee's Rules of Procedure were not provided, as requested.

In refusing to consider their request, the Change of Operations Committee has permitted the Company to circumvent the clear language of Article 8, Section 6, which reads, in pertinent part:

> Employees shall bid from the combined master seniority roster into openings at the terminal(s) into which work is being transferred. Employees so transferring shall be "dovetailed" into the appropriate active seniority roster at the new terminal(s) in the order of their continuous classification seniority. *Such transfers shall be permitted prior to the recall of laid off employees at such gaining terminal(s). If and when additional employees are required in excess of those who formed the combined active roster at the point of redomicile*, employees on letter of layoff at that location shall be recalled. If recalled, such employees shall be "dovetailed" with their continuous classification seniority.

(Emphasis added) The undersigned grievants hereby call upon the National Grievance Committee for an interpretation of the above-quoted language of Article 8, Section 6, as permitted by Article 8, Section 1. Grievants request that the Conference Joint Area Committee be instructed to hear the matter for the purpose of making a record, "after which it shall be immediately referred to the National Grievance Committee."

So that the grievants will be able to fully present this matter free of the conflict of interest of the local union,

it is further requested that they be permitted independent counsel to represent them before the Conference Joint Area Committee and the National Grievance Committee.

So that the grievants will know whether any further steps are necessary for them to present this matter properly to the National Grievance Committee and whether the committee will hear the matter, a response to this letter is requested within then (10) days. It should be addressed to Mr. Thomas C. Terry at the following Address:

Thomas C. Terry
Post Office Box 12688
Winston-Salem, N.C. 27107

Sincerely yours,

(On behalf of all affected employees)

xc: Mr. C. S. Williams (Local 391 Business Agent)
Mr. R. S. Bell (Director, Labor Relations, McLean Trucking Co.)

Enclosures

EASTERN CONFERENCE JOINT AREA COMMITTEE

OFFICE OF THE EMPLOYER
Co-Secretary
925 Penn Avenue
Pittsburgh, Pennsylvania 15222
PHONE: Area Code 412
281-9364

OFFICE OF THE UNION
Co-Secretary
4641 Montgomery Avenue
Bethesda, Maryland 20014
PHONE: Area Code 301
656-6006

April 1, 1983

Mr. Thomas C. Terry
P. O. Box 12688
Winston-Salem, North Carolina 27107

Re: Case No. R-21-83
Local 391 v. McLean
Trucking Co.

Dear Mr. Terry:

In response to your letter dated March 23, 1983, please be advised that it is our position that the grievance was properly before the Bi-State Committee. Accordingly, the decision of that Committee is final and binding.

Any grievance should be presented to your Local Union. We disagree that the matter of your previous grievance was solely an issue within the jurisdiction of the Change of Operations Committee. Once the Change of Operations Committee has made a decision, any alleged breaches of the Agreement are properly submitted to the local grievance committee.

I trust that this explanation answers your problem, although we recognize that the answer is not satisfactory to you. If you have a grievance, it must be presented to your Local Union. You are obligated to present your grievance to your Local Union in accordance with the collective bargaining agreement and your internal union procedures of your Constitution.

There is no absolute right to be represented by your own attorney and the procedures before any grievance committee under the collective bargaining agreement must be determined by the rules of that committee. In general, attorneys do not participate in the grievance committee proceedings.

Very truly yours,

/s/ James H. Hutchinson, Jr.
JAMES H. HUTCHINSON, JR.
Employer Co-Secretary

/s/ Joseph W. Burkhard
JOSEPH W. BURKHARD
Union Co-Secretary

JHHjr:JWB:hbm

CHAUFFEURS, TEAMSTERS & HELPERS
LOCAL 391

Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Eastern Conference of Teamsters

Joint Council No. 9

R. V. DURHAM
president

B. D. BLEVINS
secretary-treasurer

March 18, 1983

TO ALL OVER-THE-ROAD DRIVERS EMPLOYED BY McLEAN TRUCKING COMPANY, WINSTON-SALEM, N. C. TERMINAL:

Re: Grievance filed by James E. Wilson, Donald E. Henderson, Sam Callahan, C. C. Worley and all affected employees contending they were improperly and unjustly laid off effective 2/26/83 and requesting to be immediately returned to the lineup and compensated for all lost earnings for the period of time they were held off in violaton of the decision in Case No. R-21-83.

The above referenced case was heard by the Carolina Bi-State Grievance Committee on Wednesday, March 16, 1983. The decision of the Committee was as follows:

"Having considered all the facts and exhibits as fully presented by the Local Union and the Employer and the testimony of the individual grievants, the Committee finds that the layoffs of the grievants, effective February 26, 1983 was proper and in accord with the provisions of Articles 8 and 42 of the National Master Freight Agreement and the Carolina Freight Council Over-the-Road Supplement and in compliance with the decision of the

Eastern Conference Joint Area Committee in Case No. R-21-83. The Committee finds no subterfuge. Accordingly, the claim is denied."

If there is any question regarding the above decision, please do not hesitate to call me.

Fraternally yours,

TEAMSTERS LOCAL UNION
No. 391

/s/ C. S. Williams
C. S. WILLIAMS
First Trustee and
Business Agent

CSW:c

cc W. Honeycutt
W. F. Bowman

March 14, 1983

Mr. C. S. Williams
First Trustee and Business Agent
Chauffeurs, Teamsters and Helpers Local 391
Post Office Box 929
Kernersville, North Carolina 27284

Re: Grievance Complain of 2/28/83
of James E. Wilson, Donald E. Henderson, Sam Callahan, C. C. Worley and all affected employees of McLean Trucking Company

Dear Sir and Brother:

The undersigned grievants in a grievance complaint filed against McLean Trucking Company on February 28, 1983 hereby request that they be permitted to retain independent counsel to represent them and appear on their behalf at the meeting of the Carolina Bi-State Committee which is presently scheduled for Wednesday, March 16, 1983 and at all subsequent meetings, hearings and proceedings. As grounds for this request grievants contend that the Local Union, and its business agent, intend to remain neutral rather than actively advocate the position of grievants. Further, business agent Williams, on behalf of Local 391, has already taken a position contrary to that set forth in the grievance complaint, as shown from the transcript of the July 26, 1982 meeting of the Eastern Conference Joint Area Committee when the Change of Operations was first being considered. For these reasons the grievants must have independent counsel to represent them and present their position.

The undersigned grievants further request that the matter be continued from the March 16, 1983 meeting of the Carolina Bi-State Committee to the next meeting of that committee in order to permit them adequate time to retain counsel and for counsel to be prepared to present their claim.

It is requested that the Local Union and the company representative to whom a copy of this letter is being sent, immediately contact grievant Thomas C. Terry at 765-2102 to communicate their position on the request for representation by independent counsel and the request for a continuance until the next meeting of the Carolina Bi-State Committee.

Sincerely yours,

xc: Mr. R. S. Bell

Teamsters Local Union 391

Date 2/28/83

COMPLAINT

Nature of Complaint: The below listed employees contend that they were improperly and unjustly laid off effective Sat., 2/26/83, as a subterfuge to circumvent the decision rendered in Case R-21-83 and Article 8 of the National Master Freight Agreement and Carolina Freight Council Over-the-Road Supplemental Agreement. They are requesting to immediately be returned to the regular lineup and compensated for all lost earnings for the period of time that they were held off in violation of the decision in Case No. R-21-83.

Name of Complaint: /s/ James E. Wilson, /s/ Donald E. Henderson, /s/ Sam Callahan, /s/ C. C. Worley and all affected employees.

Employed by: McLean Trucking Company

Date (s) Discussed with Employer: 1. ——— 2. ——— 3. ———.

Disposition of Complaint: Settled [ ]; Withdrawn [ ]; Referred to Grievance (unable to settle) [ ].

Decision by Committee: Claim Upheld [ ]; Denied [ ].

Basis for Settlement or Withdrawal (Explain)

Steward) who handled Complain: C. S. Williams
Agent)

Eastern Conference Joint Area Committee

Established in accordance with the terms and conditions of the National Master Freight Agreement and the Carolina Supplemental Agreement, entered into by and between the Local Union and carriers engaged in City Pickup and Delivery and or Over-the-Road Freight Operations.

———

Docket No. R-21-83

IN THE MATTER OF THE DISPUTE BETWEEN
TEAMSTERS LOCAL(s) 391, KERNERSVILLE, N.C.

and

MCLEAN TRKG. CO.

———

SUBMISSION

———

We, the undersigned, parties to the National Master Freight Agreement and the Carolina Supplemental Agreement, hereby agree to submit the dispute to arbitration under the Rules of Procedure prescribed by the Eastern Conference Joint Area Committee, by virtue of its authority, as set forth in Article 43 and 44 of the Carolina Supplemental Agreement, the following:

> On behalf of E. L. Strange, D. E. Henderson, et al, the Union is alleging a violation of Arts. 5, 8 & 42. Improper Layoff. Requesting 8 hrs. per day on unjustly laid off time.

The undersigned further agree that a majority of the Eastern Conference Joint Area Committee in the above dispute will be final, conclusive and binding with no appeal and, further, that neither party will attempt through any overt acts, to void the decision rendered.

The undersigned also agree that failure to comply with the decision of a majority of the Committee within ten (10) days of the date of the decision will result in the loss of all contract rights, privileges and benefits due them under Article 44 of the Carolina Supplemental Agreement.

Date	Jan. 24, 1983
Employer	McLean Trkg.
Signed by	R. S. Bell
Title	Director—Labor Relations
Local Union(s)	391
Signed by	Charles Williams
Title	First Trustee & B.A.

DECISION

The panel in executive session, motion made, seconded and carried that in accordance with the established seniority rules of the Joint Conference Change of Operations Committees, the company and Local Union are instructed that, effective February 7, 1983, the company is to recall to work those drivers that made up the Winston-Salem active seniority list on the date the change of operations took effect (Oct. 10-11, 1982), i.e., those redomiciled drivers as well as Winston-Salem drivers working on this date. Those drivers who do not qualify for regular work under this decision shall be laid off and subject to recall when regular work develops in excess of 220 regular positions. Should future layoffs be necessary then individuals on this active seniority list shall be laid off on reverse seniority order and shall be recalled to work before those drivers who were on the inactive list as of Oct. 10-12 1982 are recalled.

The company and Local Union are further instructed to verify the number that were actually on the active seniority list as of October 11-12, 1982, and if that number is at odds with the number 220, as listed herein, then that number shall apply. The moretary claim is denied.

Relative to the claim by Mr. Terry, the Committee reviewed the transcript, the records, and the decision and find that under the application of the Southern Modified Seniority, the claim is without merit. The claim is denied. Cost Split.

James H. Hutchinson, Jr. Employer Co-Secretary	Joseph W. Burkhard Union Co-Secretary
January 24, 1983 (Date)	January 24, 1983 (Date)

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

File No. C-83-693-WS

THOMAS C. TERRY, and others similarly situated as set forth on Exhibit A,

Plaintiffs,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL 391; AND McLEAN TRUCKING COMPANY, INC.,

Defendants.

AMENDMENT OF COMPLAINT

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, the plaintiffs hereby amend their Complaint as a matter of right, including the caption and other allegations as indicated on the attached Amended Complaint filed herein.

This the 3d day of August, 1983.

/s/ Jim D. Cooley
JIM D. COOLEY

/s/ Robert M. Elliot
ROBERT M. ELLIOT
Attorneys for Plaintiffs

Of Counsel:

PFEEFERKORN, COOLEY, PISHKO
& ELLIOT, P.A.
202 W. Third St.
P.O. Box 43
Winston-Salem, NC 27102
Telephone: (919) 725-0251

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

File No. C-83-693-WS

THOMAS C. TERRY, DAN FIELDS, JIM CROWE, KEITH BARKER, JAMES A. RICHARDS, DON WRIGHT, DAVID L. GILTZ, DALE BISHOP, TONY BAITY, JAMES R. DAVIS, DON BRITT, LONNIE DAVIS, JIM WILSON, DAVID C. KING, DONALD E. HENDERSON, ARTHUR JARRELL, RON RAY, J. C. GREER, GARY PEEBLES, HAROLD DYSON, ED STRANGE, SAM E. CALLAHAN, GEORGE C. BLANKENSHIP, JR., PAUL EMBRY, CLAYTON WORLEY, JOHN R. MARSHALL, and ROBERT C. MUNSEY,

Plaintiffs,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL 391; and McLEAN TRUCKING COMPANY,

Defendants.

AMENDED COMPLAINT

The plaintiffs, amending their Complaint as a matter of right pursuant to Rule 15 of the Federal Rules of Civil Procedure, state and allege the following:

JURISDICTION

1. This is an action for declaratory and injunctive relief, damages and back pay under the terms of the Labor Management Relations Act of 1947, as amended, (hereinafter "the Act"), 29 U.S.C. §§ 141 *et seq* and 159(a) and the Labor Management Reporting and Disclosure Procedures Act of 1959 (hereinafter "LMRDA"), 29 U.S.C. §§ 401 *et seq.*

2. This Court has jurisdiction of the controversy pursuant to 29 U.S.C. §§ 185 and 412; 28 U.S.C. §§ 1337, 2201, and 2202, and the doctrine of pendent jurisdiction.

3. The unlawful employment practices complained of below were and are being committed within the Middle District of the State of North Carolina.

PARTIES

4. The following plaintiffs are citizens and residents of the Middle District of North Carolina: Thomas C. Terry, Dan Fields, Jim Crowe, Keith Barker, David L. Giltz, Dale Bishop, Tony Baity, James R. Davis, Don Britt, Lonnie Davis, Jim Wilson, David C. King, Donald E. Henderson, Arther Jarrell, Ron Ray, J. C. Greer, Gary Peebles, Harold Dyson, Clayton Worley, and Don Wright.

5. The plaintiffs James A. Richards, Ed Strange, Sam E. Callahan, George C. Blankenship, Jr., Paul Embry, Donald E. Henderson, John R. Marshall, and Robert C. Munsey, are citizens and residents of the State of Virginia.

6. The defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (hereinafter "defendant International Union"); and the defendant Chauffeurs, Teamsters, and Helpers, Local 391, (hereinafter "defendant Local Union") are labor organizations representing the employees in an industry affecting commerce as defined in Section 501(1) and (3), and 101(5) of the Act, 29 U.S.C. §§ 142(1) and (3), 152(5); and within the meaning of Section 301 of the Act, 29 U.S.C. §§ 185 and Section 3(c), (i) and (j) of the LMRDA, 29 U.S.C. § 402(c), (i) and (j). At all times mentioned herein the defendant Unions were the exclusive bargaining agent for the plaintiffs and other employees of the defendant McLean Trucking Company.

7. The defendant, McLean Trucking Company (hereinafter "defendant Company") is a corporation organized

and existing under the laws of the State of North Carolina. Said defendant is presently and was at all times complained of herein engaged and doing business in the State of North Carolina with its principal place of business in Winston-Salem, North Carolina. The defendant is engaged in the business of interstate transportation of goods by truck, and is an employer in an industry affecting commerce as defined by Sections 501(1) and (3) and 101(2), (6) and (7) of the Act, 29 U.S.C. §§ 142(1) and (3), 152(2), (6) and (7) and within the meaning of Section 301 of the Act, 29 U.S.C. § 185, and Section (3)(c) and (e) of the LMRDA, 29 U.S.C. § 402(c) and (e).

8. All plaintiffs, with the exception of plaintiffs Marshall and Munsey, are presently and were at all times mentioned herein members in good standing of the defendant Unions and employees of the defendant Company. The plaintiffs Marshall and Munsey are members in good standing of the defendant Unions; and were at all times mentioned herein employees of the defendant Company until their respective terminations from said employment, plaintiff Marshall in or about June, 1983, and plaintiff Munsey in or about November, 1982. All plaintiffs were employed by the defendant Company as truckdrivers.

AGREEMENTS BETWEEN THE PARTIES

9. The defendants are signatories to and otherwise bound by a collective bargaining agreement entitled The National Master Freight Agreement together with the Carolina Freight Council Over-The-Road Supplemental Agreement (March 1, 1982 through March 31, 1985) and other supplemental agreements in other parts of the country (hereinafter "the Agreements"). Each of these agreements was entered into by the defendant Union for the benefit of their members. Plaintiffs, as members of the defendant Unions, are entitled to the benefit of these agreements and to enforce the provisions thereof.

10. Article 8 of the Agreement contains the following provisions which, among others, are pertinent to this action:

> Closing, Partial Closing of Terminals—Transfer of Work
>
> (1) When branches, terminals, divisions or operations (hereinafter "terminal(s)") are closed or partially closed and the work of such terminal(s) is transferred, in whole or in part, to another terminal(s) the active employees (excluding those employees on letter of layoff) at the closed or partially closed terminal(s) shall have the right to bid into another seniority roster (road or city) comprised of bidders from the active seniority rosters of closed or partially closed terminal(s) in the order of their continuous classification (road or city) seniority. Continuous classification seniority shall be defined as that seniority which the employee is currently exercising and has not been broken in the manner provided by Article 5, Section 1 or by voluntary changes in domicile not directed, approved or ordered by a Change of Operations Committee. Employees shall bid from the combined master seniority roster into openings at the terminal(s) into which work is being transferred. Employees so transferring shall be "dovetailed" into the appropriate active seniority roster at the new terminal(s) in the order of their continuous classification seniority. Such transfers shall be permitted prior to the recall of laid off employees at such gaining terminal(s). If and when additional employees are required in excess of those who formed the combined active roster at the point of redomicile, employees on letter of layoff at that location shall be recalled. If recalled, such employees shall be "dovetailed" with their continuous classification seniority.

> In addition, the inactive seniority rosters (employees who are on letter of layoff) at the terminal(s) from which employees are being redomiciled shall be "dovetailed" into a master "laid-off" seniority roster and such employees shall have the same opportunities to transfer to terminal(s) within the Area of the Supplemental Agreement which are afforded to employees covered by the provisions of subparagraph 2(b) below.
>
> • • •
>
> (4) Any employee redomiciled by an approved Change of Operations or vountary transfer to another domicile shall upon reporting to such new domicile be deemed to have relinquished his right to return, with seniority, to the domicile from which he was transferred, except under another approved Change of Operation. Employees who avail themselves of the transfer privileges because they are on layoff at their original terminal may exercise their seniority rights if work becomes available at their original terminal during the three year layoff period allowed them at their original terminal.

FIRST CAUSE OF ACTION

11. Prior to October 10, 1982, the plaintiffs were, as previously stated, all members of the defendant Unions and employees of the defendant Company who were based in the defendant Company's terminals in other areas of the country. In or about July, 1982, the plaintiffs were informed by the defendant Company that there would be a change of operations entailing a reduction in the number of drivers in some terminals. In accordance with the above Agreements, the defendant Company proposed a Change of Operations, which specified certain terminals of the defendant Company which would gain drivers and other terminals which would lose drivers. Said Change of Operations also specified the number of drivers to be added to or reduced from each terminal.

12. On July 26, 1982, the defendant Company's Change of Operations Plan was approved with certain modifications by the Joint Conference Change of Operations Committee, which had been established by the defendants pursuant to the above Agreements. The approved Change of Operations Plan stated that, "The Company will post at each losing domicile (copy to Local Union) a copy of the current seniority list of each gaining domicile. . ." The Decision of the Joint Committee approving said Plan provided in pertinent part the following:

> 5. Those employees redomiciling shall bid out of their present domicile on the basis of their current classification bidding seniority and shall be dovetailed into the seniority list at the redomicile point on the basis of this bidding seniority except that individuals redomiciling to points within the Eastern Conference area shall be dovetailed on the basis of company seniority.
>
> * * *
>
> The active seniority list shall be determined as of June 15, 1982. The effective date of this change shall be no sooner than September 7, 1982.

13. In accordance with the above Agreements, and the Decision of the Joint Committee, the plaintiffs were given the opportunity to bid on certain terminals where they could transfer to follow work which would be re-routed pursuant to the Change of Operations, and were provided the active seniority list of each gaining domicile. The Change of Operations specified that the Winston-Salem terminal of the defendant Company had 145 drivers on its active list and would add an additional 62 drivers to its active list to meet the increased work demands resulting from the changes. Based on these representations of the defendant Company, the plaintiffs bid on the Winston-Salem job and obtained transfers from their previous domiciles to the Winston-Salem terminal of the defendant Company.

14. On or about October 10, 1982, all of the plaintiffs in fact transferred to the Winston-Salem terminal of the defendant Company. However, when they arrived, there were 185 drivers on the active list as opposed to the 145 drivers which had been represented in the Change of Operations Plan of the defendant Company. Thus, with the addition of the 62 re-domiciled drivers, there were 247 active drivers in the Winston-Salem Terminal of the defendant Company on October 10, 1982.

15. On or about November 23, 1982, 30 re-domiciled drivers, including the plaintiffs, were placed on layoff, leaving a total of 217 active drivers. On November 24, 1982, a grievance was filed by the plaintiffs in which they charged that the defendant Company had misrepresented the number of active drivers in the Winston-Salem terminal at the time the plaintiffs bid on the jobs; and as a result of said misrepresentation, many of the plaintiffs were laid off and denied the opportuntiy to work.

16. On November 30, 1982, the plaintiff Terry filed a grievance requesting to be returned to his original terminal in Oklahoma City, Oklahoma. The plaintiff Terry based his request on provisions in the above Agreements which provided that a re-domiciled driver who was laid off in his former domicile prior to making his bid could request a transfer back to his former domicile if he became laid off at his new domicile.

17. Prior to the decision on the aforesaid grievances, the defendant Company brought an additional 25 drivers back to work from layoff status. These were all drivers who had been on the Winston-Salem inactive list as of October 10, 1982, and were not part of the 185 drivers who were active at the time the Change of Operations went into effect. They were brought back during the period of time from approximately December 4, to December 7, 1982, making a total of 242 active drivers. On January 7, 1983, an additional 20 drivers, most of whom

were again re-domiciled drivers including some of the plaintiffs, were placed on layoff.

18. On or about January 17, 1983, the Bi-State Committee composed of members of the defendant Company and the defendant Unions referred the aforesaid grievances, Case No. R-21-83, to the Multi-Conference Change of Operations Committee. However, the Eastern Conference Joint Area Committee was subsequently scheduled to hear said grievances. Said Committee, which was also composed of members of the defendant Company and the defendant Unions, conducted a hearing on the plaintiffs' grievances on January 24, 1983. At said hearing the authorized representative of the defendant Local Union represented to the Committee that he would be unable to represent the plaintiffs on their grievances because of a conflict of interest between the plaintiffs and other members of the defendant Local Union; and that he would therefore remain neutral. Nevertheless, the Committee proceeded to hear the evidence and make a decision.

19. On February 4, 1983, the plaintiffs were given notice of the Decision of the Eastern Conference Joint Area Committee in Case No. R-21-83. Said Decision ordered the defendant Company to recall all drivers who made up the Winston-Salem active list on October 10, 1982, by February 7, 1983, and to lay off any drivers who were not included on said list. The Decision further provided that if future layoffs were necessary, then the drivers on the active list would be laid off "in reverse seniority order and shall be recalled to work before those drivers who were on the inactive list as of October 10, 1982 are recalled." The Committee denied the plaintiffs' claims for monetary damages resulting from the defendant Company's violation of the above Agreements. The plaintiffs exhausted all remedies available to them under said Agreements.

20. In the aforesaid Decision the Committee also denied plaintiff Terry's grievance which had been filed on

November 30, 1982. The plaintiff Terry exhausted all remedies available to him under said Agreements.

21. In its actions from June, 1982, through January, 1983, the defendant Company breached the above Agreements and violated the terms of the Change of Operations which had been approved by Decision of the Committee on July 26, 1982. Specifically, the defendant Company violated said Agreement and Decision in adding 40 drivers to the active list of the Winston-Salem terminal to total 185 active drivers after representing to the plaintiffs and others that there would be 145 drivers on the active list; by laying off the plaintiffs in November, 1982, through January, 1983, and in failing to recall them before drivers who had been on the inactive list as of October 10, 1982; by failing to transfer the plaintiff Terry to his former domicile as requested in his Grievance of November 30, 1982; and in failing to compensate the plaintiffs for lost wages which they incurred as a result of the wrongful actions of the defendant Company. The foregoing and other actions of the defendant Company were committed with the collusion and acquiescence of the defendant Unions for the specific purpose of favoring Winston-Salem drivers who had been on the inactive list at the time of the Change of Operations by manipulating their layoffs and recalls in order to push the plaintiffs into lower seniority positions than they were entitled to under the Agreements and Decision above. At the time of the Change of Operations and the bids for the Winston-Salem terminal, the plaintiffs relied on representations of the defendant Company as to the number of drivers on the active list; the defendant Company should, therefore, be estopped from denying that the total number of active drivers on the active list in the Winston-Salem terminal as of October 10, 1982, was 145 as represented to the plaintiffs, and that the previous and unnounced additions of Winston-Salem drivers from the inactive list prior to October 10, 1982, constituted a violation of the Change of Operations Decision above.

22. The defendant Unions, in breach of their statutory duty of fair representation owing to the plaintiffs under the provisions of the Act, conspired with the defendant Company to engage in the aforesaid actions in violation of the rights of the plaintiffs; and acquiesced in such acts in order to further the interests of their Winston-Salem members who had been on the inactive list at the time of the Change of Operations, and to bring them back onto the active list. Said actions on the part of the defendant Unions in concert with and in collusion with the defendant Company constitutes blatant discrimination against the plaintiffs in favor of other members of the defendant Local Union who had been employed at the Winston-Salem terminal for a longer period of time.

23. The defendant Unions further breached their duty of fair representation against the plaintiffs to represent the plaintiffs on their grievances in an effective and adequate manner. In fact, due to an acknowledged conflict of interest between its members, the defendant Local Union represented to the Committee that it was "neutral" when in fact, it was well known that the defendant Union was biased in favor of the Winston-Salem drivers, and was hostile to the interests of the plaintiffs. By failing to act on plaintiffs' behalf and by their perfunctory and inadequate actions taken, the defendant Unions have violated their duty of fair representation of the plaintiffs and have arbitrarily, discriminatorily, and in bad faith deprived them of their contract employment rights and their rights to a fair hearing. In addition, the defendant Unions permitted the Decision of January 24, 1984, to stand and failed to take any steps to appeal said Decision or to seek review thereof by the Multi-Conference Change of Operations Committee which was the proper tribunal to hear the grievances.

24. As a direct result of the defendant Unions' collusion with the defendant Company in the above actions and in its failure to represent the plaintiffs in a fair and

effective manner, the Joint Committee entered the Decision of January 24, 1983, which wrongfully revised the active seniority list of October 10, 1982, in accordance with the defendants' actions and in violation of the above Agreements and Change of Operations Decision; which denied the plaintiff's legitimate claims for monetary damages; and which denied the plaintiff Terry's grievance without due consideration. While said Decision required the recall of the plaintiffs, the plaintiffs incurred substantial damages in lost wages and were placed in lower seniority positions as a result of the Committee's actions.

SECOND CAUSE OF ACTION

25. The plaintiffs hereby incorporate by reference Paragraphs 1 through 24 above as if fully set forth herein.

26. Following the Decision in Case Number R-21-83 of January 24, 1983, the defendant Company recalled the re-domiciled drivers including the plaintiffs who had been placed on layoff from November 23, 1982, to January, 1983. At the same time it placed on layoff the 30 drivers who had been on the inactive list as of October 10, 1982, but who had been called back since that time. However, on or about February 8, 1983, all 30 Winston-Salem drivers who had been laid off the previous day were called back to work. Most did not even receive their notice of layoff from the previous day before receiving notice of recall, and none of them missed any time from work whatsoever. At that time there was no increase of "regular work" which would justify an immediate and permanent recall of the Winston-Salem drivers. The effect of this action of the defendant Company was to permit said Winston-Salem drivers to regain their places on the active list ahead of the redomiciled drivers including the plaintiffs. This action on the part of the Company was taken with the acquiescence and collusion of the defendant Unions and constitutes a blatant subter-

fuge and circumvention of the Decision of January 24, 1983.

27. On or about February 26, 1983, 20 re-domiciled drivers including some of the plaintiffs were laid off. None of the 31 Winston-Salem drivers who had been recalled on February 8, 1983, were placed on layoff at that time.

28. On February 28, 1983, the plaintiffs filed a grievance contending that the layoff of February 26, 1983, was a "subterfuge" by the defendant Company to circumvent the Decision of the Eastern Conference Joint Area Committee dated January 24, 1983, in Case Number R-21-83. The plaintiffs requested to be recalled by the defendant Company and to be compensated for their lost wages. Said grievance was scheduled to be heard by the Carolina Bi-State Grievance Committee in Myrtle Beach, South Carolina, on March 16, 1983. Prior to said hearing, the plaintiffs objected to the defendant Local Union's anticipated representation on the grounds that said defendant had an admitted conflict of interest in representing opposing groups of members. On that basis the plaintiffs requested the right to have independent counsel at said hearing. The defendant Local Union denied said request. Subsequently, the plaintiffs informed the Committee of the defendant Local Union's conflict of interest and requested the opportunity to have independent counsel and to have additional time in which to prepare their case with the assistance of counsel. The Committee also denied the plaintiffs' request and conducted a hearing on the plaintiffs' grievance. In the course of said hearing the Committee and the defendant Local Union through its agent refused to allow the plaintiffs to question the defendant Union witnesses.

29. After a hearing on the grievance, the Committee rendered a Decision dated March 16, 1983, in which it found that the layoff was proper and was not a "subterfuge". Thereafter, the plaintiffs attempted to appeal said Decision to the Joint Committee and to the National Grievance Committee but were denied review. Accordingly, the plaintiffs exhausted all remedies available to them or made every reasonable effort to do so.

30. In its actions from February 4, 1983, through March, 1983, the defendant Company breached the above Agreements and violated the terms of the Change of Operations as well as the Decision of the Joint Committee dated January 24, 1983. Specifically, the defendant Company violated said Agreements and Decision in its recall of the Winston-Salem drivers who had been on the inactive list as of October 10, 1982, immediately after the layoff of said drivers pursuant to said Decision when there was no increased regular work demand to justify said recall; and in laying off the re-domiciled drivers including the plaintiffs on February 26, 1983, and thereafter in March, 1983. The foregoing and other actions of the defendant Company were committed with the collusion and acquiescence of the defendant Unions for the specific purpose of favoring Winston-Salem drivers who had been on the inactive list at the time of the Change of Operations by circumventing the Decision of January 24, 1983, in order to permit Winston-Salem drivers to retain their seniority position which they held prior to the Change of Operations, thereby permitting the layoff of redomiciled drivers including the plaintiffs on February 26, 1983, and thereafter.

31. The defendant Unions, in breach of their statutory duty of fair representation owing to the plaintiffs under the provisions of the Act, conspired with the defendant Company to engage in the aforesaid actions in violation of the rights of the plaintiffs; and acquiesced in such acts in order to further the interests of the Winston-Salem members who had been on the inactive list at the time of the Change of Operations and to bring them back onto the active list. Said actions on the part of the de-

fendant Unions in concert with and in collusion with the defendant Company constitutes blatant discrimination against the plaintiffs in favor of other members of the defendant Local Union who had been employed at the Winston-Salem terminal for a longer period of time.

32. The defendant Unions further breached their duty of fair representation against the plaintiffs in refusing to permit plaintiffs to retain independent counsel when it was clear by the defendant Local Union's previous actions that it had an insurmountable conflict of interest and could not represent the plaintiffs in a fair and effective manner. The defendant Unions further violated their duty of fair representation against the plaintiffs in refusing to allow the plaintiffs to conduct their own representation by questioning Union witnesses at the hearing before the Bi-State Committee.

Furthermore, after the representation of the plaintiffs was undertaken by the defendant Unions, the defendant Unions failed to represent the plaintiffs in an effective manner. By failing to act on the plaintiffs' behalf as described herein and by their perfunctory and inadequate actions taken, the defendant Unions have violated their duty of fair representation of the plaintiffs and have arbitrarily, discriminatorily, and in bad faith deprived them of their contract employment rights and their rights to a fair hearing.

33. As a direct result of the defendant Unions' collusion with the defendant Company in the above actions and their failure to represent the plaintiffs in a fair and effective manner, the Bi-State Committee found that the Decision of the Joint Committee of January 24, 1983, had not been violated and that the subsequent layoffs and recalls were proper pursuant to said Decision.

THIRD CAUSE OF ACTION

34. The plaintiffs hereby incorporate by reference Paragraph 1 through 33 above as if fully set forth herein.

35. Following the above Decision on the plaintiffs' grievance of February 28, 1983, the defendant Company continued on a periodic basis laying off and recalling drivers in a manner contrary to the Agreement and Change of Operations as well as the Decision of the Eastern Conference Joint Area Committee of January 24, 1983. In fact, the defendant Company has continued such action up to the present time.

36. On April 29, 1983, the plaintiffs filed an additional grievance claiming that they had been improperly excluded from a recall of April 24, 1983. On or about May 27, 1983, the defendant Local Union's business agent decided on his own motion that the recall of April 24, 1983, was in compliance with the previous decisions in this case.

37. The defendant Company's continued actions as set forth above constitute blatant violations of the plaintiffs' rights under the Agreement, the Change of Operations Decision, and the Decision of the Joint Committee of January 24, 1983. As previously stated, the defendant Company has continued to act in collusion with and with the acquiescence of the defendant Unions in denying to the plaintiffs their employment rights and in discriminating against the plaintiffs in favor of the Winston-Salem drivers.

38. The defendant Unions, in breach of their statutory duty of fair representation owing to the plaintiffs under the provisions of the Act, have conspired with the defendant Company to engage in the continuing violations of the rights of the plaintiffs; and have acquiesced in such acts in order to further the interests of the Winston-Salem members who had been on the inactive list at the time of the Change of Operations and to bring them back

onto the active list. Said actions on the part of the defendant Unions in concert with and in collusion with the defendant Company constitutes blatant discrimination against the plaintiffs in favor of other members of the defendant Local Union who had been employed at the Winson-Salem terminal for a longer period of time.

39. The defendant Unions further breached their duty of fair representation against the plaintiffs in failing to pursue the plaintiffs' grievance of April 29, 1983, and in failing to represent the plaintiffs in said grievance in an effective and adequate manner. By failing to act on the plaintiffs' behalf and by their perfunctory and inadequate actions taken, the defendant Unions have continued to violate their duty of fair representation of the plaintiffs and have arbitrarily, discriminatorily, and in bad faith deprived them of their contract employment rights and their rights to a fair hearing.

40. As a direct result of the defendant Company's violations of said Agreement and Decisions and of the defendant Unions' collusion with the defendant Company and additional breaches of its duty of fair representation, the plaintiffs have been and continue to be placed at a lower seniority position than that to which they were entitled according to the Change of Operations resulting in frequent layoffs from their employment and consequential lost wages.

DAMAGES

41. As a direct and proximate result of the defendant Company's violation of the Agreement and Decisions described above, and the breach by the defendant Unions of their duty of fair representation owing to the plaintiffs, each plaintiff has suffered and continues to suffer severe and substantial damages, including the following:

(a) Lost wages in an amount in excess of $15,000.00;

(b) Costs and expenses for moving, travel, and other expenditures related to transferring himself and his family to Winston-Salem, North Carolina, in excess of those expenses paid by the defendant Company pursuant to the Change of Operations Decision;

(c) Future loss of wages in an amount to be shown at trial;

(d) Insurance, health, welfare, pension, social security benefits, and other benefits in an amount to be shown at trial;

(e) Damages on account of the mental and emotional distress suffered by the plaintiff as a result of his frequent periods of unemployment resulting from the defendants' actions described herein.

42. The actions of the defendants as described herein were undertaken in bad faith with malice or wanton and reckless disregard for the plaintiffs' rights under the Agreement and other Decisions cited herein, and for the duty of fair representation owed by defendant Unions to the plaintiffs. Each plaintiff is thereby entitled to recover punitive damages from the defendants in an amount in excess of $25,000.00.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray this Court for the following relief:

(1) That this Court declare that the actions of the defendants as described herein are unlawful, wrongful, and in violation of the plaintiffs' rights arising out of the law, the Agreements, and the Decisions herein;

(2) That each of the plaintiffs recover compensatory and punitive damages as proven at trial;

(3) That this Court issue a permanent injunction enjoining the defendants from continuing to violate the

plaintiffs' rights and directing the defendant Company to place the plaintiffs in their proper seniority positions to which they were entitled as a result of the Change of Operations Decision of July 26, 1982;

(4) That the plaintiffs recover reasonable attorney's fees for their representation in this case;

(5) That the costs of this action be assessed against the defendants;

(6) That this Court grant such other and further relief as may seem just and proper;

(7) The plaintiffs demand a trial by jury on all issues herein.

This the 3d day of August, 1983.

/s/ Jim D. Cooley
JIM D. COOLEY

/s/ Robert M. Elliot
ROBERT M. ELLIOT
Attorneys for Plaintiff

Of Counsel:

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[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA WINSTON-SALEM DIVISION

No. C-83-693-WS

THOMAS C. TERRY, *et al.*,
Plaintiffs,
v.
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; *et al.*,
Defendants.

ANSWER TO AMENDED COMPLAINT

[Filed September 21, 1983]

The defendant, Chauffeurs, Teamsters and Helpers Local 391 (hereinafter referred to as Local 391) answering the complaint of the plaintiffs, alleges and says:

FIRST DEFENSE

The complaint fails to state claim against defendant Local 391 upon which relief can be granted.

SECOND DEFENSE

The complaint is barred because of the running of the applicable statute of limitations or the doctrine of latches or both.

THIRD DEFENSE

The defendant McLean Trucking Company, Inc. (hereinafter referred to as the "Company") and the defendant Unions are parties to a Collective Bargaining Agreement. Said Collective Bargaining Agreement contains a grievance procedure. Pursuant to said grievance pro-

cedure, defendant Local 391 filed grievances on behalf of the plaintiffs concerning the matters raised by the plaintiffs in this complaint. Said grievances were heard by the proper grievance committees as established by the grievance procedure under the Collective Bargaining Agreement. Said committees rendered two final and binding decisions. The first decision, dated January 24, 1983, a copy of which is attached hereto as Exhibit A, and incorporated by reference herein, found that the defendant Company had breached the Collective Bargaining Agreement and ordered the defendant Company to take certain steps to rectify its error. The defendant Company took the steps required by the grievance decision of January 24, 1983. The second decision rendered on or about March 16, 1983, which dealt with actions taken by the Company after January 24, 1983, found that the defendant Company had not breached the Collective Bargaining Agreement in effect between the defendant Company and the defendant Unions. The results of these grievance procedures are final and binding on the plaintiffs and cannot be relitigated in this Court.

FOURTH DEFENSE

The claims of the plaintiffs are barred by their failure to exhaust the procedures for settlements of complaints and grievances established by the By-Laws of the defendant Local 391, as expressly required in Article XIII of the By-Laws of the defendant Local 391.

FIFTH DEFENSE

Defendant Local 391 has properly and fairly represented the plaintiffs at all times under the Collective Bargaining Agreement in force between the Company and Local 391, has not discriminated against the plaintiffs in any way and therefore the Complaint against the defendant Local 391 should be dismissed.

SIXTH DEFENSE

The defendant Company was justified under the provisions of the Collective Bargaining Agreement in effect between the Company and the defendant Unions in taking the actions ultimately complained of by the plaintiffs in this complaint and there was, therefore, no breach of the Collective Bargaining Agreement.

SEVENTH DEFENSE

In answer to the specific allegations contained in the numbered paragraphs of the Amended Complaint, the defendant Local 391 alleges and says:

1. As to the allegations in paragraphs 1 and 2 of the complaint, it is admitted that plaintiffs contend that the cited federal statutes grant jurisdiction in this case. However, as the complaint fails to state claims for relief against Local 391 there is no jurisdiction and therefore said allegations in paragraphs 1 and 2 are denied.

2. It is denied that any unlawful employment practices occurred as alleged in paragraph 3 of the complaint. However, it is admitted that the actions which plaintiffs complained of took place within the Middle District of North Carolina.

3. As to the allegations in paragraphs 4 and 5 of the complaint, the defendant Local 391 is without knowledge or information sufficient to form a belief as to the truth of said allegations and therefore said allegations of paragraphs 4 and 5 are denied.

4. The allegations of paragraphs 6, 7 and 8 of the complaint are admitted.

5. As to the allegations in paragraph 9 of the complaint, it is denied that the plaintiffs are entitled to enforce the provisions of the Collective Bargaining Agreement referred to in paragraph 8 of the complaint. All other allegations of paragraph 9 of the complaint are admitted.

6. As to the allegations in paragraph 10 of the complaint, it is admitted that Article VIII of the Agreement contains certain provisions. The provisions contained in Article VIII of the "Agreement" are attached hereto as Exhibit B and incorporated herein by reference. All other allegations of paragraph 10 of the complaint are denied.

7. As to the allegations in paragraph 11 of the complaint, it is denied that prior to October 10, 1982, the plaintiffs were members of the defendant Local 391. The other allegations of paragraph 11 of the complaint are admitted.

8. As to the allegations in paragraph 12 of the complaint, it is admitted that on or about July 26, 1982 the defendant Company's Change of Operation Plan was heard by the Joint Conference Change of Operation Committee which rendered a decision, a copy of which is attached hereto as Exhibit C and incorporated herein by reference. That decision was amended on August 4, 1982. A copy of that Amendment is attached hereto as Exhibit D and incorporated herein by reference. That Decision and Amendment of the Joint Conference Change of Operations Committee, which are attached to this Answer, speak for themselves and therefore the other allegations of paragraph 12 of the complaint are denied.

9. As to the allegations in paragraph 13 of the complaint, it is admitted that the plaintiffs were given the opportunity to bid on certain terminals where they could transfer to pursuant to the Change of Operations Plan of the Company and the Decision of the Joint Conference Change of Operations Committee. As to the other allegations of paragraph 13 of the complaint, defendant Local 391 is without knowledge or information sufficient to form a belief as to the truth of those allegations and therefore said allegations are denied.

10. As to the allegations in paragraph 14 of the complaint, it is admitted that on or about October 10,

1982, all of the plaintiffs transferred to the Winston Salem terminal of the defendant Company. As to the other allegations of paragraph 14 of the complaint, defendant Local 391 is without knowledge or information sufficient to form a belief as to the truth of those allegations and therefore said allegations are denied.

11. As to the allegations in paragraph 15 of the complaint, it is admitted that on or about November 23, 1982, thirty employees of the defendant Company were placed on layoffs and that on November 24, 1982, a grievance was filed by certain employees of the defendant company concerning this layoff. All other allegations of paragraph 15 of the complaint are denied.

12. As to the allegations in paragraph 16 of the complaint, is is admitted that on or about November 30, 1982, the plaintiff Terry filed a grievance requesting that he be returned to his original terminal in Oklahoma City, Oklahoma. All other allegations of paragraph 16 of the complaint are denied.

13. As to the allegations in paragraph 17 of the complaint, it is admitted that during December, 1982, certain employees of the defendant Company were recalled to work from layoff status and that on or about January 7, 1983, certain other employees of the Company were placed on layoff. All other allegations of paragraph 17 of the complaint are denied.

14. As to the allegations in paragraph 18 of the complaint, it is admitted that the Eastern Conference Joint Area Committee heard grievances filed by employees of the defendant Company, including some of the plaintiffs. This hearing was held on January 24, 1983. Following that hearing the Committee rendered a decision on or about January 24, 1983, a copy of which is attached hereto as Exhibit E and incorporated herein by reference. All other allegations of paragraph 18 of the complaint are denied.

15. As to the allegations of paragraph 19 of the complaint, it is admitted that the Eastern Conference Joint Area Committee issued a decision in Case No. R-21-83, a copy of which is attached as Exhibit E. That decision speaks for itself and therefore the other allegations of paragraph 19 of the complaint are denied.

16. As to the allegations in paragraph 20 of the complaint, it is admitted that in the decision attached hereto as Exhibit E, the Eastern Conference Joint Area Committee denied plaintiff Terry's grievance which had been filed on or about November 30, 1982. All other allegations of paragraph 20 of the complaint are denied.

17. The allegations of paragraphs 21, 22, 23 and 24 are denied.

18. As to the allegations of paragraph 25 of the complaint, the defendant Local 391 hereby incorporates by reference thereto its answers to paragraphs 1 through 24 of the complaint, as set forth above.

19. As to the allegations of paragraph 26 of the complaint, it is admitted that following the decision in case No. R-21-83 of January 24, 1983, attached hereto as Exhibit E, the defendant Company recalled certain employees, including the plaintiffs, who had been placed on layoff and were ordered to be returned to active status by the decision of January 24, 1983. It is also admitted that following the decision in Case No. R-21-83 of January 24, 1983, the Company placed on layoff thirty employees and that these thirty employees were recalled back to work on or about February 8, 1983. All other allegations of paragraph 26 of the complaint are denied.

20. As to the allegations of paragraph 27 of the complaint, it is admitted that on or about February 26, 1983, twenty employees of the defendant Company, including some of the plaintiffs, were laid off but that none of the thirty employees who had been recalled on February 8, 1983, were placed on layoff at that time. All other allegations of paragraph 27 of the complaint are denied.

21. As to the allegations in paragraph 28 of the complaint, it is admitted that on February 28, 1983, certain employees of the defendant Company filed a grievance, a copy of which is attached hereto as Exhibit F and incorporated herein by reference. As that grievance speaks for itself, the other allegations of paragraph 28 of the complaint dealing with what was stated or contended or requested in said grievance are denied. It is further admitted that the grievance filed on or about February 28, 1983, was scheduled to be heard by the Carolina Bi-State Grievance Committee in Myrtle Beach, South Carolina on March 16, 1983. All other allegations of paragraph 28 of the complaint are denied.

22. As to the allegations in paragraph 29 of the complaint, it is admitted that following the hearing on the grievance, the Carolina Bi-State Grievance Committee rendered a decision dated March 16, 1983, a copy of which is attached hereto as Exhibit G and incorporated herein by reference. It is also admitted that following this decision, certain employees of the defendant Company, including some of the plaintiffs, attempted to appeal said decision to the Eastern Conference Joint Area Committee and the National Grievance Committee. All other allegations of paragraph 29 of the complaint are denied.

23. The allegations of paragraphs 30, 31, 32 and 33 of the complaint are denied.

24. As to the allegations in paragraph 34 of the complaint, the defendant Local 391 hereby incorporates by reference thereto its answers to paragraphs 1 through 33 of the complaint as set forth above.

25. As to the allegations in paragraph 35 of the complaint, it is admitted that since February 28, 1983, the defendant Company has laid off and recalled employees.

All other allegations of paragraph 35 of the complaint are denied.

26. As to the allegations in paragraph 36 of the complaint, it is admitted that on or about April 29, 1983, certain employees of the defendant, including some of the plaintiffs, filed an additional grievance, a copy of which is attached hereto as Exhibit H and incorporated herein by reference. All other allegations of paragraph 36 of the complaint are denied.

27. The allegations of paragraphs 37, 38, 39, 40, 41 and 42 are denied.

WHEREFORE, the defendant Local 391 prays the Court that the plaintiffs have and recover nothing from the defendant Local 391; that the complaint of the plaintiffs against defendant Local 391 be dismissed; that the costs of this action, including a reasonable attorney fee for the attorneys of defendant Local 391 be assessed against the plaintiffs; and that the Court grant such other and further relief as it may deem just and proper.

This the 21 day of Sept., 1983.

/s/ J. David James
J. DAVID JAMES
Attorney for Local 391
Smith, Patterson, Follin, Curtis,
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700 Southeastern Building
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Telephone: (919) 274-2992

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EXHIBIT A

Eastern Conference Joint Area Committee

Established in accordance with the terms and conditions of the National Master Freight Agreement and the Carolina Supplemental Agreement, entered into by and between the Local Unions and carriers engaged in City Pickup and Delivery and/or Over-the-Road Operations.

Docket No. R-21-83

IN THE MATTER OF THE DISPUTE BETWEEN

TEAMSTERS LOCAL(S) No. 391

Kernersville, NC

and

MCLEAN TRKG. CO.

Submission

We, the undersigned, parties to the National Master Freight Agreement and the Carolina Supplemental Agreement, hereby agree to submit the dispute to arbitration under the Rules of Procedure prescribed by the Eastern Conference Joint Area Committee, by virtue of its authority, as set forth in Article 43 and 44 of the Carolina Supplemental Agreement, the following:

> On behalf of E.L. Strange, D.E. Henderson, et al, the Union is alleging a violation of Arts. 5, 8 & 42. Improper Layoff. Requesting 8 hrs. per day on unjustly laid off time.

The undersigned further agree that a majority decision of the Eastern Conference Joint Area Committee in the

above dispute will be final, conclusive and binding with no appeal and, further, that neither party will attempt through any overt acts, to void the decision rendered.

The undersigned also agree that failure to comply with the decision of a majority of the Committee within ten (10) days of the date of the decision will result in the loss of all contract rights, privileges and benefits due them under Article 44 of the Carolina Supplemental Agreement.

Date	Jan. 24, 1983
Employer	McLean Trkg.
Signed by	R.S. Bell
Title	Director—Labor Relations
Local Union(s)	391
Signed by	Charles Williams
Title	First Trustee & B.A.

DECISION

The panel in executive session, motion made, seconded and carried that in accordance with the established seniority rules of the Joint Conference, Change of Operations Committee, the company and Local Union are instructed that, effective February 7, 1983, the company is to recall to work those drivers that made up the Winston-Salem active seniority list on the date the change of operations took effect. (Oct. 10-11, 1982), i.e., those redomiciled drivers as well as Winston-Salem drivers working on this date. Those drivers who do not qualify for regular work under this decision shall be laid off and subject to recall when regular work develops in excess of 220 regular positions. Should future layoffs be necessary then individuals on this active seniority list shall be laid off in reverse seniority order and shall be recalled to work

before those drivers who were on the inactive list as of Oct. 10-1982 are recalled.

The company and Local Union are further instructed to verify the number that were actually on the active seniority list as of October 11-12, 1982, and if that number is at odds with the number 220, as listed herein, then that number shall apply. The monetary claim is denied.

Relative to the claim by Mr. Terry, the Committee reviewed the transcript, the records, and the decision and find that under the application of the Southern Modified Seniority, the claim is without merit. The claim is denied. Cost Split.

James H. Hutchinson, Jr. Employer Co-Secretary	Joseph W. Burkhard Union Co-Secretary
January 24, 1983 (Date)	January 24, 1983 (Date)

EXHIBIT B

Section 5.

In the event of strikes, work stoppages, or other activities which are permitted in case of deadlock, default, failure to comply with majority decisions or permitted by Article 8, Section 2(a) under this Agreement or any Supplement thereto, no interpretation of this Agreement or any Supplement thereto by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strikers unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement.

Section 6.

Change of Operations

Change of Operations Committee

(a) Present terminals, breaking points or domiciles shall not be transferred or changed without the approval of an appropriate Change of Operations Committee. Such Committee shall be appointed in each of the Conference Areas, equally composed of Employer and Union representatives. The Change of Operations Committee shall have the authority to determine the senority of the employees affected and such determination shall be final and binding.

Such Committee, however, shall observe the Employer's right to designate home domiciles and the operational requirements of the business. Individual employees shall not be redomiciled more than once during the term of this contract as a result of an approved Change of Operations unless a merger, purchase, sale, acquisition, or consolidation of Employers is involved, or unless the Change of Operations Committee rules to the contrary based on the facts presented.

In considering a Change of Operations, the Change of Operations Committee shall have the authority to extend the three year layoff period contained in Article 5, Section 1, or in applicable Supplemental Agreements, in the event it appears toward the end of such three year period that the circumstances so warrant.

The Change of Operations Committee shall also have jurisdiction for a period of twelve (12) months following the opening of a new terminal to consider the redomicile of employees who are laid off as a direct result of such opening of a terminal. This Committee shall also have jurisdiction over the closing of terminals in regard to seniority.

The above shall not apply within a 25-mile radius.

Change of Operations Committee Procedure

(b) The National Grievance Committee shall adopt Rules of Procedure concerning the application and administration of this Article.

The Employer shall notify all affected Local Unions of the proposed Change of Operations at least twenty (20) calendar days prior to the hearing at the Conference Joint Area Committee, and the Employer and the Local Unions involved shall have a mutual responsibility to inform the employees subject to redomicile prior to such hearing in accordance with the practice and procedures agreed to in the respective Area Committee. Any exception or waiver of the aforesaid twenty (20) day period shall be mutually agreed to between the Employer and the Local Unions involved and approved by the Conference Area Change of Operations Committee.

Moving Expenses

(c) Where an employee is required to transfer to another domicile in order to follow employment as a result of a Change of Operations, the Employer shall move the

employee and assume the responsibility for proven loss or damage to household goods due to such move, including insurance against loss or damage. Should any employee possess household items of unusual or extraordinary value which will be included in the move, such items shall be declared and an appraised value determined prior to the move. The Employer shall provide packing materials for the employee's household goods when requested or at the employee's request pay all costs and expenses of moving such household goods, including packing.

The Employer shall pay reasonable expenses to demount and remount an employee's mobile home, if used as his residence and in such instance shall pay normal expenses to move such mobile home, including the use of other modes of transportation where required by law.

An employee shall have a maximum of one year to move in accordance with the provisions of an approved Change of Operations unless, prior to the expiration of such year, he requests, in writing, an extension for a reasonable period of time due to an unusual or special problem. The Employer shall provide lodging for the employee at the point of redomicile, not to exceed sixty (60) calendar days, and in addition, shall reimburse the employee twenty cents (20¢) per mile to transport one personal automobile to the new location.

The Employer shall not be responsible for moving expenses if the employee changes his residence as a result of voluntary transfer.

None of the Employer obligations set forth in this Section shall apply to transfers of domiciles within a 50-mile radius.

Change of Operations Seniority

(d) The Change of Operations Committee established herein shall have the sole authority to determine questions of the application of seniority in those situations pre-

sented to it and in connection therewith the following general rules shall apply, subject, however, to modification as provided by Section 6(g) below:

Closing, Partial Closing of Terminals—
Transfer of Work

(1) When branches, terminals, divisions or operations (hereinafter "terminal(s)") are closed or partially closed and the work of such terminal(s) is transferred, in whole or in part, to another terminal(s) the active employees (excluding those employees on letter of layoff) at the closed or partially closed terminal(s) shall have the right to bid into a master seniority roster (road or city) comprised of bidders from the active seniority rosters of closed or partially closed terminal(s) in the order of their continuous classification (road or city) seniority. Continuous classification seniority shall be defined as that seniority which the employee is currently exercising and has not been broken in the manner provided by Article 5, Section 1 or by voluntary changes in domicile not directed, approved or ordered by a Change of Operations Committee. Employees shall bid from the combined master seniority roster into openings at the terminal(s) into which work is being transferred. Employees so transferring shall be "dovetailed" into the appropriate active seniority roster at the new terminal(s) in the order of their continuous classification seniority. Such transfers shall be permitted prior to the recall of laid off employees at such gaining terminal(s). If and when additional employees are required in excess of those who formed the combined active roster at the point of redomicile, employees on letter of layoff at that location shall be recalled. If recalled, such employees shall be "dovetailed" with their continuous classification seniority.

In addition, the inactive seniority rosters (employees who are on letter of layoff) at the terminal(s) from which employees are being redomiciled shall be "dove-

tailed" into a master "laid-off seniority roster and such employees shall have the same opportunities to transfer to terminal(s) within the Area of Supplemental Agreement which are afforded to employees covered by the provisions of subparagraph 2(b) below.

Closing of Terminals—Elimination of Work

(2) a. When a terminal(s) is closed and the work of such terminal(s) is eliminated, an employee who was formerly employed at another terminal shall have the right to return to such former terminal and exercise his continuous classification (road or city) seniority, provided, he has not been away from such former terminal for more than a three (3) year period.

Layoff

b. When a terminal(s) is closed and the work of such terminal(s) is eliminated, employees who are laid off thereby shall be given first opportuntiy for available regular employment at any other terminal(s) of the Employer within the Area of the Supplemental Agreement where such employee was employed. The obligation to offer such employment shall continue for a period of three (3) years from the date of closing. However, the Employer shall not be required to make more than one offer during this period. Any employee accepting such offer shall pay his own moving expenses. If hired, he shall go to the bottom of the seniority board for bidding and layoff purposes, but shall retain company seniority for fringe benefits only.

Opening of Terminals

(3) When a new terminal(s) is opened (except as a replacement for existing operations or a new division in a locality where there are existing operations), the Employer shall offer to those employees, if any, affected thereby the opportunity to transfer to regular positions in the new terminal(s) in the order of such employee's

continuous classification (road or city) seniority date as defined herein. Upon arrival at such new location, such employees shall be "dovetailed" with their continuous classification (road or city) seniority date together with other employees so transferring.

This provision is not intended to cover situations where there is replacement of an existing operation or where a new division is opened in a locality where there is an existing terminal. In these latter situations, those employees laid off at the existing facilities shall have first opportunity for employment at the new operation in accordance with their continuous classification (road or city) seniority date, and upon arrival shall be similarly "dovetailed." If all regular full-time positions are not filled in this manner, then the provisions of the preceding paragraph shall apply.

(4) Any employee redomiciled by an approved Change of Operations or voluntary transfer to another domicile shall upon reporting to such new domicile be deemed to have relinquished his right to return, with seniority, to the domicile from which he was transferred, except under another approved Change of Operations. Employees who avail themselves of the transfer privileges because they are on layoff at their original terminal may exercise their seniority rights if work becomes available at their original terminal during the three year layoff period allowed them at their original terminal.

Definition of Terms

(e) The term "continuous classification seniority" as used in this Agreement is defined as that seniority which the employee is currently exercising and has not been broken in the manner provided in Article 5, Section 1, or by voluntary changes in domicile not directed, approved or ordered by a Change of Operations Committee.

Qualifications

(f) In all transfers referred to in this Section, the employee must be qualified to perform the job by experience in the classification. If a driver test is required, such test shall be given by a qualified driver-supervisor or driver.

Intent of Parties

(g) The parties acknowledge that the above rules are intended solely as general standards and further that many factual situations will be presented which necessitate different application, modification or amendment. Accordingly, the parties acknowledge that questions of the application of seniority rights may arise which require different treatment and it is anticipated and understood that the Employers and Unions jointly involved and/or the respective grievance committees may mutually agree to such disposition of questions of seniority which in their judgment is appropriate under the circumstances.

The Change of Operations Committees, as provided herein or in the Supplemental Agreements, shall have the authority to determine the application of seniority in those situations presented to them. In all cases the seniority decisions of the Joint Committees, including the Change of Operations Committees and Subcommittees, established by the National Master Freight Agreement and the respective Supplemental Agreements shall be final and binding.

Section 7.

All local, area and national grievance committees as constituted under this Agreement shall have the jurisdiction and power to decide grievances which arose under the preceding agreements and supplements thereto, applying, however, the contract under which the grievance arose.

ARTICLE 9.

PROTECTION OF RIGHTS

Section 1.

Picket Lines

It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket line of Unions party to this Agreement, and including primary picket lines at the Employer's places of business.

Section 2.

Struck Goods

It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action if any employee refuses to perform any service which his Employer undertakes to perform as an ally of an Employer or person whose employees are on strike, and which service, but for such strikes, would be performed by the employees of the Employer or person on strike.

Section 3.

Subject to Article 32 hereof (Subcontracting), the Employer agrees that it will not cease or refrain from handling, using, transporting, or otherwise dealing in any of the products of any other Employer or cease doing business with any other person, or fail in any obligation imposed by the Motor Carriers' Act or other applicable liaw, as a result of individual employees exercising their rights under this Agreement or under law, but the Employer shall, notwithstanding any other provision in this Agreement, when necessary, continue doing such business,

including pickup or delivery to or from the Employer's terminal and to or from the premises of a shipper or consignee.

Section 4.

The layover provisions of the applicable Supplemental Agreement shall apply when the Employer knowingly dispatches a road driver to a terminal at which a primary picket line has been posted as a result of the exhaustion of the grievance procedure, or after proper notification of a picket line permitted by the collective bargaining agreement, or economic strikes occurring after the expiration of collective bargaining agreements or to achieve a collective bargaining agreement. In such event and upon his request, a driver shall be provided first class public transportation to his home terminal, plus be paid a minimum of eight (8) hours or actual time spent while returning, whichever is greater. The Employer shall determine the mode of transportation to be utilized.

Section 5.

Grievances

Within five (5) working days of filing of grievance claiming violation of this Article, the grievance shall be submitted directly to the National Grievance Committee without taking any intermediate steps, any other provisions of this Agreement to the contrary notwithstanding.

EXHIBIT C

Joint Conference Change of Operations Committee

Established in accordance with the terms and conditions of the National Master Freight Agreement and the various Supplemental Agreements, entered into by and between the Local Unions and carriers engaged in City Pickup and Delivery and/or Over-the-Road Freight Operations.

Docket No. JC-CO-7-82

IN THE MATTER OF REQUEST FOR CHANGE OF OPERATIONS INVOLVING 20, 41, 100, 135, 377, 413, 600, 710, 28, 29, 71, 261, 391, 429, 538, 592, 480, 519, 568, 577, 667, 728, 745, 886, 891 & 988

and

MCLEAN TRUCKING COMPANY

SUBMISSION

We, the undersigned, parties to the National Master Freight Agreement and the various Supplemental Agreements, hereby agree to submit the matter to arbitration under Article 8(e) of the National Master Freight Agreement and the rules and regulations established pursuant thereto.

REQUEST FOR CHANGE OF OPERATIONS

The undersigned further agree that a majority decision of the Joint Conference Change of Operations Committee in the above matter will be final, conclusive and binding with no appeal and, further, that neither party will attempt through any over acts, to void the decision rendered.

Date July 26, 1982
Employer McLean Trucking Co.
Signed by C.R. Jones
Title Vice President-Labor Relations

Local No.	Signature	Title
20	Bill Raike	V.P.
41		
100	Mike Connelley	B.A.
135	Bill Waskom	B.A.
377		
413	Don Linville	Secy.-Treas.
600	Robert J. Ramshaw	
710		
28	Frank Wood	
29	David A. Chrisman	
71	Ken Bowman	
261	Jack Frazier	
391	C.E. Williams	
429	John Ignatosky	
538	Raymond Baker	
592	R.M. Jenkins	
480	Clyde Powers	
519		
568	Laird Evans	
577	John Stanton	
667	Johnny Raney	
728	F.W. Shepherd	
745		
886	J. Fisher	
891	Frank Hopkins	
988		

DECISION

The panel in executive session, motion made, seconded and carried that the change of operations be approved as submitted except as modified herein.

1. The company shall pay lodging, at the point of redomicile, for a period of sixty (60) days.
2. The company is directed to continue to pay applicable pension contributions to the same pension trust funds as paid immediately prior to the effective date of the change until such time as the reciprocity agreement is effective and consistent with applicable law.
3. The company is directed to make health and welfare contributions to the applicable health and welfare fund at the point of redomicile in such a manner as to provide continuous coverage, where the trustees at the involved funds agree. Health & Welfare payments may continue to be made to, and health & welfare coverage provided by the original fund for a period of time not to exceed two (2) years.
4. The company is to comply with the contract in the payment of moving expenses.
5. Those employees redomiciling shall bid out of their present domicile on the basis of their current classification bidding seniority and shall be dovetailed into the seniority list at the redomicile point on the basis of this bidding seniority except that individuals redomiciling to points within the Eastern Conference area shall be dovetailed on the basis of company seniority.
6. Those individuals on long-term disability or bona fide leave of absence, shall exercise their seniority for redomicile at the time of the bid even though they may not be able to accept work at the redomicile point until a later date.

7. Where applicable (terminals with a single seniority list system) employees which they redomiciled for a period of one (1) year unless a new bid is put into effect after a period of nine (9) months.

The bidding from the losing road driver domicile in the Southern Conference; Nashville, Shreveport, Amarillo, Atlanta & Jackson, Mississippi shall be as follows: Those drivers shall be offered the following options in seniority order. (A) Take a letter of layoff and move under modified seniority system. No moving expenses will be paid. (B) Take a letter of terminal layoff and be subject to recall at driver's home domicile only. (C) Bid to active master list on pool. Must bid a position at a gaining domicile at telephone bid.

Jackson, Mississippi is a closed Southern Conference domicile covered by modified system seniority. Drivers on layoff at the Jackson terminal shall have recall rights under modified system seniority at Meredian, Mississippi, the new terminal that will perform the work that Jackson formerly performed. Modified shall be paid prior to the effective date of the change of operations. June 15, 1982, is to be used to determine active status; drivers who have moved under modified since June 15 are, in effect, redomiciled at that location.

The active seniority list shall be determined as of June 15, 1982.

The effective date of this change shall be no sooner than September 7, 1982.

Cost to Company

James H. Hutchinson, Jr.
Employer Co-Secretary

July 26, 1982
Date

Joseph W. Burkhard
Union Co-Secretary

July 26, 1982
Date

EXHIBIT D

EASTERN CONFERENCE
JOINT AREA COMMITTEE

August 4, 1982

Mr. C.R. Jones, Vice President
Labor Relations
McLean Trucking Company
P.O. Box 213
Winston-Salem, North Carolina 27102

Re: ECJAC Case JC-CO-7-82

Dear Mr. Jones:

Reference is made to the above-captioned case which was heard before the Committee on July 26.

Please make the following additions to the decision on your records:

"There shall be a 90-day window period. The Company shall not be required to bid for 90 days."

With best wishes,

Very truly yours,

JOSEPH W. BURKHARD
Union Co-Secretary

JAMES H. HUTCHINSON, JR.
Employer Co-Secretary

JWB:JHH:dlk
cc: All Local Unions Involved

EXHIBIT E

EASTERN CONFERENCE
JOINT AREA COMMITTEE

Established in accordance with the terms and conditions of the National Master Freight Agreement and the Carolina Supplemental Agreement, entered into by and between the Local Union and carriers engaged in City Pickup and Delivery and/or Over-the-Road Freight Operations.

Docket No. R-21-83

IN THE MATTER OF THE DISPUTE BETWEEN
TEAMSTERS LOCAL(S) No. 391
Kernersville, NC

and

MCLEAN TRKG. CO.

SUBMISSION

We, the undersigned, parties to the National Master Freight Agreement and the Carolina Supplemental Agreement, hereby agree to submit the dispute to arbitration under the Rules of Procedure prescribed by the Eastern Conference Joint Area Committee, by virtue of its authority, as set forth in Article 43 and 44 of the Carolina Supplemental Agreement, the following:

On behalf of E.L. Strange, D.E. Henderson, et al, the Union is alleging a violation of Arts. 5, 8 & 42. Improper Layoff. Requesting 8 hrs. per day on unjustly laid off time.

The undersigned further agree that a majority decision of the Eastern Conference Joint Area Committee is the above dispute will be final, conclusive and binding with

no appeal and, further, that neither party will attempt through any overt acts, to void the decision rendered.

The undersigned also agree that failure to comply with the decision of a majority of the Committee within ten (10) days of the date of the decision will result in the loss of all contract rights, privileges and benefits due them under Article 44 of the Carolina Supplemental Agreement.

Date: Jan. 24, 1983

Employer: McLean Trkg.

Signed by: R.S. Bell

Title: Director—Labor Relations

Local Union(s): 391

Signed by: Charles Williams

Title: First Trustee & B.A.

DECISION

The panel in executive session, motion made, seconded and carried that in accordance with the established seniority rules of the Joint Conference Change of Operations Committees, the company and Local Union are instructed that, effective February 7, 1983, the company is to recall to work those drivers that made up the Winston-Salem active seniority list on the date the change of operations took effect (Oct. 10-11, 1982), i.e., those redomiciled drivers as well as Winston-Salem drivers working on this date. Those drivers who do not qualify for regular work under this decision shall be laid off and subject to recall when regular work develops in excess of 220 regular positions. Should future layoffs be necessary then individuals on this active seniority list shall be laid off in reverse seniority order and shall be recalled to work before those drivers who were on the inactive list as of Oct. 10, 1982 are recalled.

The company and Local Union are further instructed to verify the number that were actually on the active seniority list as of October 11-12, 1982, and if that number is at odds with the number 220, as listed herein, then that number shall apply. The monetary claim is denied.

Relative to the claim by Mr. Terry, the Committee reviewed the transcript, the records, and the decision and find that under the application of the Southern Modified Seniority, the claim is without merit. The claim is denied. Cost Split.

James H. Hutchinson, Jr.
Employer Co-Secretary

January 24, 1983
(Date)

Joseph W. Burkhard
Union Co-Secretary

January 24, 1983
(Date)

EXHIBIT F

COMPLAINT

Date: 2/28/83

Nature of Complaint: The below listed employees contend that they were improperly and unjustly laid off effective Sat., 2/26/83, as a subterfuge to circumvent the decision rendered in Case R-21-83 and Article 8 of the National Master Freight Agreement and Carolina Freight Council Over-the-Road Supplemental Agreement. They are requesting to immediately be returned to the regular lineup and compensated for all lost earnings for the period of time that they were held off in violation of the decision in Case No. R-21-83.

James E. Wilson/Donald E. Henderson

Name of Complainant: Sam Callahan, C.C. Worley and all affected employees

Employed by: McLean Trucking Company

Date(s) Discussed with Employer: 1. ..... 2. ..... 3. .....

Disposition of Complaint: Settled [ ]; Withdrawn [ ];

Referred to Grievance (unable to settle) [ ].

Decision by Committee: Claim Upheld [ ]; Denied [ ].

Basis for Settlement or Withdrawal (Explain)

Steward Agent who handled Complaint: C. S. Williams

EXHIBIT G

OVER THE ROAD AGREEMENT
GRIEVANCE REFERRED TO
BI-STATE COMMITTEE

March 1, 1983

Local Union: TEAMSTERS LOCAL UNION No. 391

Agent's Name: C. S. WILLIAMS

Company: MCLEAN TRUCKING COMPANY

Terminal: WINSTON-SALEM, N.C.

Type of Complaint: Improper Layoff, Paid for time, seniority and violation of change of operations

Name of Employee: James E. Wilson, D. E. Henderson, Sam Callahan, C. C. Worley and all affected employees

Contract—Articles & Sections Violated: Articles 8, 42 National Master Freight Agreement, Carolina Freight Council Over-the-Road Supplemental Agreement and decision in Case No. R-21-83.

State briefly nature of complaint: The above employees contend that they were improperly and unjustly laid off effective Saturday, 2/26/83, as a subterfuge to circumvent the decision rendered in Case R-21-83 and Article 8 of the National Master Freight Agreement and Carolina Freight Council Over-the-Road Supplemental Agreement. They are requesting to immediately be returned to the regular lineup and be compensated for all lost earnings for the period of time that they were held off in violation of the decision in Case No. R-21-83.

What attempt has been made to settle?

Decision of the Bi-State Committee: Having considered all the facts and exhibits, as fully presented by the local union and the employer, and the testimony of the individual grievants, the Committee finds that the layoff of the grievants, effective February 26, 1983, was proper and in accord with the provisions of Articles 8 and 42 of the National Frieight Agreement and the Carolina Freight Council Over-the-Road Supplement, and in compliance with the decision of the Eastern Conference Joint Area Committee in Case No. R-21-83. The Committee finds no subterfuge. According, the Claim is Denied. Fee Union

Case No.: 216 R 83

Chairman: [Illegible]

J. Stephenson

Date:

EXHIBIT H

TEAMSTERS LOCAL UNION NO. 391

COMPLAINT

Date: April 29, 1983

Nature of Complaint: We the below listed employees contend that we were improperly & unjustly by passed on a call back of approximately Sunday 4/24/83 as a subterfuge to circumvent the decision rendered in Case R-21-83. The decision calls for call back of active members of the board as of Oct. 10, 11, 1982. Instead the company called back from the inactive list & the active list. We are requesting to be returned immediately to the regular lineup & compensated for all lost earnings for the period of time that we were held off in violation of the decision in Case R-21-.

Name of Complainant: Coburn K. Barker—A.T. Fields and all affected employees.

Employed by: McLean Trucking Company

Date (s) Discussed with Employer: 1 ——— 2. ——— 3. ———

Disposition of Complaint: Settled []; Withdrawn []; Referred to Grievance (unable to settle) [].

Decision by Committee: Claim Upheld []; Denied [].

Basis for Settlement or Withdrawal (Explain) I have reviewed this complaint and find that the recall was in compliance with the decision in Case No. #R-21-83. If you have any further questions, feel free to call me.

cc W. Honeycutt
W. Bowman
R. V. Durham

Steward Agent who handled Complaint:

C.S. Williams 5/27/83

Copies: White—Union; Canary—Member; Pink—Company.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

No. C-83-693-WS

THOMAS C. TERRY, *et al.*,
Plaintiff

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPER'S OF AMERICA, *et al.*,
Defendants

MOTION TO STRIKE JURY TRIAL DEMAND

NOW COMES, the defendant, Chauffeurs, Teamsters and Helper's Local Union 391, pursuant to Rule 12(f) and Rule 39(a) of the Federal Rules of Civil Procedure and moves to strike the prayer in which the plaintiffs demand a jury trial. Defendant, Local 391, contends for the reason's set forth in the brief filed contemporaneously herewith that plaintiffs have no right to a jury trial in this action.

Wherefore, for the foregoing reasons, defendant respectfully requests the Court to grant its motion to strike plaintiffs jury trial demand.

This the 6 day of January, 1986.

/s/ J. David James
J. DAVID JAMES
Attorney for
Defendant Local 391

SMITH, PATTERSON, FOLLIN,
CURTIS, JAMES & HARKAVY
700 Southeastern Building
Greensboro, North Carolina
27401

Telephone: 919-274-2992

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

File No. C-83-693-WS

THOMAS C. TERRY, *et al.*,
Plaintiffs,

v.

CHAUFFEURS, TEAMSTERS and HELPERS LOCAL 391; and MCLEAN TRUCKING COMPANY, INC.,
Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO STRIKE JURY TRIAL DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure and Local 203, the plaintiffs hereby respond to the Motion to Strike Jury Trial Demand filed by the defendant Chauffeurs, Teamsters and Helpers Local Union 391 in this action; and request that the Court deny said Motion on the ground that the plaintiffs are entitled to a trial by jury under the United States Constitution and for other reasons stated in the Brief filed in support of this Response.

WHEREFORE, the plaintiffs request that this Court deny said defendant's Motion, and set this case for trial by jury as demanded in the Complaint.

This the 18th day of February, 1986.

/s/ Robert M. Elliot
ROBERT M. ELLIOT
Attorney for Plaintiffs

Of Counsel:

PFEFFERKORN, PISHKO & ELLIOT, P.A.
202 West Third Street
Post Office Box 43
Winston-Salem, North Carolina 27102
Telephone: (919) 725-0251

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

Civil No. C-83-693-WS

THOMAS C. TERRY, DAN FIELDS, JIM CROWE, KEITH BARKER, JAMES A. RICHARDS, DON WRIGHT, DAVID L. GILTZ DALE BISHOP, TONY BAITY, JAMES R. DAVIS, DON BRITT, LONNIE DAVIS, JIM WILSON, DAVID C. KING, DONALD E. HENDERSON, ARTHUR JARRELL, RON RAY, J. C. GREER, GARY PEEBLES, HAROLD DYSON, ED STRANGE, SAM E. CALLAHAN, GEORGE C. BLANKENSHIP, JR., PAUL EMBRY, CLAYTON WORLEY, JOHN R. MARSHAL, and ROBERT C. MUNSEY,

Plaintiffs,

v.

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 391; and McLEAN TRUCKING COMPANY, INC.,

Defendants.

ORDER

BULLOCK, District Judge

For the reasons expressed in the opinion filed contemporaneously herewith, the Defendant's motion to strike Plaintiffs' jury demand is DENIED.

Defendant's motion concerns a controlling question of law about which there is ground for difference of opinion; therefore because the issue is critical to the continuation of the pending litigation the court certifies this order for interlocutory appeal under 28 U.S.C. § 1292(b).

Separate trials shall be held on the issues of liability and damages as authorized under Federal Rule of Civil Procedure 42(b).

/s/ Frank W. Bullock, Jr.
United States District Judge

November 10, 1987

Supreme Court, U.S.
FILED
AUG 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHAUFFEURS, TEAMSTERS AND HELPERS
LOCAL NO. 391,
Petitioner,

v.

THOMAS C. TERRY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONER

J. DAVID JAMES
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40pp

QUESTION PRESENTED

Is there a right to a jury trial of employees' claims against their union alleging that the union breached its duty of fair representation—a duty which has been implied from § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a)—whenever the employees seek monetary compensation in any form (e.g., backpay) as a part of their request for relief?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1719

CHAUFFEURS, TEAMSTERS AND HELPERS
LOCAL NO. 391,
Petitioner,

v.

THOMAS C. TERRY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is reported at 863 F.2d 334 (1988), and is reprinted at pp. 30-52 of the Appendix to the Petition for *Certiorari* ("Pet. App."). The Memorandum Opinion of the United States District Court for the Middle District of North Carolina denying petitioner's motion to strike the respondents' jury trial demand is reported at 676 F.Supp. 659 (1987) and is reprinted at Pet. App. 1-30. The decision of the Court of Appeals granting the petition of Chauffeurs, Teamsters and Helpers, Local No. 391 ("Local 391" or "Petitioner") for an interlocutory appeal on the jury trial issue is reprinted at Pet. App. 30.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1988. On March 10, 1989, Local 391 applied for an extension of time to file a petition for a writ of *certiorari*. That application was granted on March 14, 1989 by order of the Chief Justice, extending the time for filing a petition to and including April 19, 1989. The petition was filed on April 18, 1989 and granted on June 19, 1989. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

A claim against a union for breach of its duty of fair representation ("DFR") is implied from § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) ("NLRA"), which provides:

> (a) Representatives designated or selected for purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

STATEMENT OF THE CASE

1. On July 25, 1983 the respondents commenced this action in the District Court against their union (Local 391), their employer (McLean Trucking Company (hereinafter "McLean")), and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the "International").[1] The facts, as alleged in the amended complaint and as recounted in the opinions of the Court of Appeals and District Court, are as follows.

McLean and Local 391 were parties to a collective bargaining agreement. Each of the respondents was employed as a truck driver in the bargaining unit covered by that agreement. Prior to July, 1982, each lived in a location other than Winston-Salem, North Carolina. In July, 1982, McLean revamped its operations and in so doing closed the terminals near respondents' homes. Pursuant to the collective bargaining agreement's "change of operations" provisions, each of the respondents then bid for, and was transferred to, McLean's Winston-Salem terminal. After being transferred to the Winston-Salem terminal, respondents were laid off and recalled on several occasions.

In their amended complaint respondents contended that McLean had breached the agreement by manipulating re-

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[1] Although the amended complaint named McLean as a defendant, McLean thereafter filed a petition in bankruptcy and the action against McLean was stayed. Pet. App. 32, n.1; 863 F.2d at 235 n.1. On July 6, 1988, respondents eventually filed a voluntary dismissal as to McLean. And, although the amended complaint also named the Teamsters International as a defendant, the District Court granted the International's motion for summary judgment. Pet. App. at 32, n.1; 863 F.2d at 335 n.1.

call procedures so as to give other drivers preference over them. Pet. App. 33-34; 863 F.2d at 335. Respondents also contended that Local 391 failed to fairly represent them in the resulting grievances. *Id.*

The first set of grievances filed by respondents were pursued by Local 391 to an arbitration panel established under the collective bargaining agreement. As a result, McLean was ordered to adjust its layoff policy to comply with previous agreements between McLean and Local 391. Pet. App. 34; 863 F.2d at 335.

In a second set of grievances, respondents contended that McLean had engaged in a pattern of layoff and recall activity in order to circumvent the prior arbitration award. *Id.* Local 391 pursued respondents' second set of grievances to another arbitration panel established under the collective bargaining agreement. The grievances were denied. Pet. App. 34; 863 F.2d at 336.

Local 391 declined to take a third set of grievances filed by respondents to arbitration on the ground that all of the issues had been decided in the first and second arbitration awards.

As explained by the Court of Appeals, respondents contend that Local 391 "conspired with McLean and acquiesced in its violation of [their] rights and in other ways breached its duty of fair representation in the[se] grievance proceedings." Pet. App. 34-35; 863 F.2d at 336.

2. In their amended complaint, respondents contended, too, that because of the asserted breach of the duty of fair representation, the arbitration awards should not be final and binding but should be set aside. In addition, respondents "request[ed] reinstatement and other injunctive relief . . . punitive damages and other monetary relief for lost wages and health benefits and for mental and

emotional distress." Pet. App. 10; 676 F.Supp. at 661. By order dated January 9, 1989, the District Court struck the respondents' claim for punitive damages and for mental and emotional distress.[2]

On January 6, 1986, Local 391 filed its Motion to Strike Plaintiffs' Jury Trial Demand, contending that no right of jury trial existed in a duty of fair representation suit. In an order dated November 10, 1987, the District Court denied that Motion (Pet. App. 1; 676 F. Supp. 659), but certified the jury trial issue for interlocutory appeal pursuant to 29 U.S.C. § 1291(b). Joint Appendix ("J.A.") p. 78. On November 19, 1987, Local 391 petitioned the Court of Appeals for permission to appeal pursuant to 28 U.S.C. § 1291(b), and that petition was granted by order of the Fourth Circuit, dated December 20, 1988. Pet. App. 30. The Fourth Circuit, after briefing and argument, then affirmed the District Court's order, holding that the Seventh Amendment does grant a right to a jury trial of DFR claims for monetary relief such as backpay. Pet. App. 31; 863 F.2d 336.

In holding that there is a jury trial right in such cases, however, the Fourth Circuit recognized that the District of Columbia Circuit and the Eleventh Circuit had previously come to contrary conclusions on this issue. Pet. App. 45; 863 F.2d at 338. In *Leach v. Pan American World Airways*, 842 F.2d 285 (11th Cir. 1988), the Eleventh Circuit had held that parties in DFR suits have no right to jury trials, and in *Quinn v. DiGiulian*, 739 F.2d 637 (D.C. Cir. 1984), the D.C. Circuit had held that parties in DFR suits are entitled to a jury trial if the plaintiff is seeking backpay.[3]

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[2] Because McLean has ceased operation and is no longer in this case, *see* note 1, *supra*, "injunctive relief in the form of reinstatement" is also no longer at isesue. Pet. App. 10; 676 F.Supp. at 661.

[3] Although the *Leach* decision involved an action for breach of the duty of fair representation under the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* ("RLA"), rather than the NLRA, the Court

On June 19, 1989, this Court granted review on this issue.

SUMMARY OF ARGUMENT

A right to a jury trial can stem either from statute or from the Seventh Amendment itself. In a suit by an employee against the employee's union for breach of the union's duty of fair representation, neither source provides for a trial by jury.

1. The cause of action for breach of the duty of fair representation has been "judicially 'implied from the [NLRA and Railway Labor Act] and the policy [of exclusive representation] which [those acts] adopted.'" *Electrical Workers v. Foust*, 442 U.S. 42, 47 (1979) (quoting *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 204 (1944)). Since these Acts do not so much as mention a duty of fair representation, and do not explicitly provide for such cause of action, the statutes do not, in terms, create a jury trial right for fair representation claims. *See* pages 10-11, *infra*.

In enacting the NLRA, however, Congress did consider whether to authorize jury trials as the method of adjudicating the unfair labor practice actions created by the Act, and specifically *declined* to do so. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937). Given the similarity between unfair labor practices claims and breach of duty of fair representation claims, *DelCostello v. Teamsters*, 462 U.S. 151, 170 (1983), the fair inference is that Congress would not have intended juries to try the latter claims. *See* page 11, *infra*.

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of Appeals in that case correctly noted that the same rules would apply to actions under the NLRA. 842 F.2d at 287 n.2 (for purposes of fair representation suits courts have refused to distinguish the two acts) (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953)). Accordingly, in this brief, we will generally discuss the duty of fair representation under the NLRA and will not distinguish between the two acts unless the distinction is relevant.

2. This case thus turns on whether the Seventh Amendment itself requires a jury trial right in fair representation cases. The Court has recently stated the test for resolving this issue as follows:

> "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Granfinanciera v. Nordberg*, —— U.S. ——, 57 U.S.L.W. 4898, 4900 (June 23, 1989) (quoting *Tull v. United States*, 481 U.S. 412, 417-518 (1987).]

a. Of course, no such concept as a union's duty of fair representation existed in the 18th-century. But, after Congress established a national labor policy based on collective bargaining, this Court has been able to draw on traditional legal concepts in elaborating Congress' plan and has done so in implying the duty of fair representation. The duty of fair representation has its origins in the distinctive concepts of Equity's law of trusts, under which a trustee, vested with a grant of discretionary powers to act on behalf of third parties—and not subject to the plenary control of those parties—is nonetheless required to exercise that discretion in good faith, and only in those parties interests. Of course, the law of trusts—and the rights and duties the Chancellors created—was the exclusive province of Equity. *See* pages 12-16, *infra*.

b. The similarities between duty of fair representation claims of a union-represented employee and traditional equitable claims of trust beneficiaries can be clearly seen in the context of hybrid duty of fair representation suits. The structure of such suits, in which both union and employer are joined as defendants in one action brought by a plaintiff complaining of both breach of the duty of fair representation and breach of the collective bargaining agreement, is largely modeled on trust law. *See* pages 16-20, *infra*.

c. In addition to these two links to trust law, there is an additional compelling link to historic equity suits.

A hybrid duty of fair representation suit seeks "to set aside a final and binding determination of a grievance, arrived at through the collectively bargained method of resolving the grievances. It is, therefore *a direct challenge to the private settlement of disputes* under the collective-bargaining agreement," *United Parcel Services, Inc. v. Mitchell*, 451 U.S. 56, 66 (1981) (Stewart, J., concurring) (internal quotation marks and brackets deleted; emphasis added). *Accord DelCostello v. Teamsters, supra*, 462 U.S. at 165. That being so, a hybrid suit is analogous to a traditional bill in Equity seeking to vacate an arbitrator's award for unfairness in the proceedings. And in the 18th-century, such a suit could *only* be entertained in the court of Equity. *See* pages 20-21, *infra*.

3. Examination of remedies in a case such as this provide no basis for concluding this action is "legal" rather than "equitable."

a. Although respondents seek backpay as a form of monetary "make-whole" relief, this is precisely the form of relief awarded in Equity for breach of duty by a trustee. *See* pages 23-24, *infra*.

b. Not surprisingly, then, this Court has previously characterized backpay remedies as equitable in a variety of contexts. Most important is the example of backpay claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* For the scheme of relief under Title VII, like the scheme here, is based on the relevant provisions and policies of the NLRA. *See* pages 24-26, *infra*.

c. A critical difference between "law" and "equitable" remedies is the difference between the defined remedies awarded as of right in law, and the remedial discretion of Equity. The remedial decisions in a hybrid duty of fair representation action involve highly discretionary judgments. *See* pages 26-27, *infra*. The ultimate remedial standard is that a successful DFR plaintiff should be placed in the position in which he would have been after a fair arbitration decision. Thus, a DFR remedy must account for the nature of labor arbitration. And this

Court has repeatedly recognized the broad range of discretion accorded a labor arbitrator in the interest of achieving the objective of national labor policy. At no point in the arbitral process is an informed and flexible discretion more important than at the remedial stage. Thus, of necessity, providing make-whole relief in a hybrid case calls for equitable discretion and not for the traditional law's remedies. *See* pages 27-32, *infra*.

ARGUMENT

I. THERE IS NO EXPRESS OR IMPLIED STATUTORY BASIS FOR A JURY TRIAL RIGHT IN DUTY OF FAIR REPRESENTATION CASES.

In a federal statutory case, there are two potential bases for a jury trial demand: a right created in the federal statute or the right stated in the Seventh Amendment itself. Thus, the threshold question whenever a jury trial is sought in such a case is whether Congress has created such a right. *Tull v. United States, supra*, 481 U.S. at 417, n.3 (1987).

The private sector labor relations statutes—the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.*, and the Railway Labor Act, as amended, 45 U.S.C. § 151 *et seq.*—do not so much as mention a cause of action against a union for breach of its duty of fair representation, nor, indeed, the duty itself. Rather, the duty has been "judicially 'implied from the [NLRA and RLA] and the policy [of exclusive representation] which [those statutes] adopted.'" *Electrical Workers v. Foust, supra*, 442 U.S. at 47 (1979) (quoting *Steele v. Louisville & Nashville R. Co., supra*, 323 U.S. at 204). Indeed, the DFR action "had not yet [been] divined" when Congress passed the NLRA in 1395, *United States Postal Service v. Mitchell, supra*, 451 U.S. at 76, and was not judicially established until nine years after the NLRA's passage, *see Steele v. Louisville & Nashville R. Co., supra*.

In enacting the NLRA, however, Congress did consider whether to authorize jury trials as the method of adjudicating the unfair labor practice actions created by that Act. And Congress specifically *declined* to provide for such jury trials. *NLRB v. Jones & Laughlin*, *supra*, 301 U.S. at 48-49; *see also* 2 NLRB Legislative History of the NLRA of 1935 (1949), at 1630, 2168, 2189, 2233-2234 (unsuccessful criticisms of bills for not providing for jury trials). This Court has noted that "[c]ommunity hostility toward unions, management, or minority views can . . . find expression" in jury awards. *Electrical Workers v. Foust*, *supra*, 442 U.S. at 51 n.14; *see also Automobile Workers v. Russell*, 356 U.S. 634, 651 (1958) (Warren, C.J. dissenting). Congress, recognizing as much, preferred to establish an expert administrative agency that would be less likely to proceed on emotion and more likely to make the factual judgments relevant to the application of national labor policy in a neutral and objective manner.

There is, of course, a "substantial overlap" and a "family resemblance [that] is undeniable" between fair representation claims and unfair labor practice claims. *DelCostello v. Teamsters*, *supra*, 462 U.S. at 17. Given this, it is highly doubtful that Congress would have intended that some of these similar (and often identical) disputes—and not others, depending on the claimant's choice—be tried to a jury. Thus, the fair inference to be drawn from the decision the 1935 Congress reached is this: it follows from Congress' determination not to authorize jury trials in NLRA proceedings that Congress would *not* have intended juries to try the closely analogous DFR actions derived by implication from the NLRA. A contrary conclusion would in many instances bring about the result Congress rejected and would in that way trump a judgment Congress made in shaping the national labor policy.

II. THE SEVENTH AMENDMENT DOES NOT REQUIRE A JURY TRIAL RIGHT IN DUTY OF FAIR REPRESENTATION CASES.

This case thus turns on whether, in the absence of any Congressional intent to provide such a right, the Seventh Amendment itself provides for a jury trial in fair representation cases.

The Seventh Amendment states in pertinent part that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." "Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791," its application is not limited to traditional "common-law forms of action recognized at that time." *Curtis v. Loether*, 415 U.S. 189, 193 (1974). Rather, the Amendment draws a more general distinction between "suits in which *legal* rights [are] to be ascertained and determined" (and which would have been tried to juries in the 18th-century law courts) and those in which "equitable rights alone [are] recognized, and equitable remedies . . . administered" (and which would have been tried to the 18th-century equity courts with no jury). *Id.* (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-447 (1830) (Story, J.)) (emphasis in original).

The Court has recently stated that the inquiry, in the context of evaluating modern statutory causes of action, is "whether [the] action is more similar to cases that were tried in courts of law [or] to suits tried in courts of equity or admiralty." *Tull v. United States*, *supra*, 481 U.S. at 417. *See also Granfinanciera v. Nordberg*, supra, —— U.S. at ——, 57 U.S.L.W. at 4900 (quoting and following *Tull*). And a two-pronged examination is called for in making this comparison:

First, the Court will "compare the statutory action [in question] to the 18th-century actions brought in courts of England prior to the merger of the courts of law and equity." *Tull*, *supra*, 481 U.S. at 417.

Second, the Court will "examine the remedy sought and determine whether it is legal or equitable in nature." *Id.* at 417-418.[4]

Following this analysis, we now show that there is *no* Seventh Amendment right to a jury trial for claims that a union violated its duty of fair representation.

A. The Nature of the DFR Action In Relation To Traditional Actions.

A comparison of an action for breach of the duty of fair representation to "18th-century actions brought in the courts of England," 481 U.S. at 417, reveals, of course, that no such action was known at that time.

The DFR is a "creature of 'labor law'." *United Parcel Service v. Mitchell*, *supra*, 451 U.S. at 63. And the 18th century legal scheme—under which unions and collective bargaining were unlawful—had neither room nor need for such a body of law. *See, e.g., Nelles, The First American Labor Case*, 41 Yale L.J. 165, 195-199 (1931) (describing 18th-century English holdings that unions were unlawful conspiracies to raise wages). But, after Congress had established a national labor policy in which collective bargaining was central, this Court was able to draw on certain basic and traditional equitable concepts in elaborating Congress' plan.

As we will show, an examination of this Court's jurisprudence makes it plain that the fair representation duty has its origins in the traditions of Equity's law of trusts. That duty rests on the distinctive model of trust law—which alone recognized the concept of equitable interests—

[4] If, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, the Court has looked to a third factor, "whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as a fact finder." *Granfinanciera*, *supra*, 57 U.S.L.W. at 4900. "This quite distinct inquiry," *id.* at n.4, is only tangentially implicated in this case. *See* page 10, *supra*.

and which created and enforced obligations for regulating the discretion of a "trustee," who has been granted certain discretionary powers by a "settlor" to be exercised for the benefit of third parties, and who is not subject to those parties' plenary control. *See generally* 1 A. Scott, The Law of Trusts, §§ 1, 2 & 8 (4th ed. 1987). The traditional common law recognized no such relationship and, hence, created no such body of law.

1. The starting point in the formulation of the duty of fair representation is that, under national labor policy, a union, once selected by a majority of an appropriate employee bargaining unit, is vested by law with the status of "exclusive representative[] of all the employees in such unit for . . . purposes of collective bargaining," 29 U.S.C. § 159(a).

Although this system is correctly premised on the legislative judgment that entrusting the employees' chosen representative with the exclusive right to deal with the employer immeasurably enhances the bargaining position of the employees as a group, exclusive representation also necessarily alters the legal situation of each individual in the group. As Justice Jackson explained, exclusive representation, regardless of any individual employee's preferences, "not only precludes the individual from being represented by others but also prevents him from bargaining for himself." *Trailmobile v. Whirls*, 331 U.S. 40, 68 (1947) (Jackson, J., dissenting) (citing *J.I. Case v. NLRB*, 321 U.S. 332 (1944)).

There is no doubt that Congress envisoned that a union, when acting as the exclusive representative of the employee group, would enjoy a substantial measure of autonomy and would exercise a substantial measure of discretion and judgment. That is a necessary postulate of the collective bargaining system, since differing employee interests will often exist within a bargaining unit. *See*

Ford Motor Co. v. Huffman, 345 U.S. 330, 337-340 (1953).

But the Court has concluded that an exclusive representative has not been granted *unbounded* autonomy and discretion. In the Court's view, the traditional duty of a trustee to exercise all his granted discretion in good faith and in the interest of the trust beneficiaries is an integral part of the grant of exclusive representative status. The seminal duty of fair representation decision —*Steele v. Louisville & N.R. Co., supra*—identifies the duty as an instance of the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." 323 U.S. at 202.

The union—like the traditional trustee—has been granted discretionary powers for the benefit of a group of employees.[5] And the union—like the traditional trustee—is not subject to each beneficiary's direction and control. Rather, each employee in the represented group—like the traditional trust beneficiary—must rely on the union's best judgment as to the group's interests and as to how those interests are to be furthered. Moreover, after *Steele*, each employee in the represented group—like each traditional trust beneficiary—is recognized as having an enforceable right of redress if the union fails to comply with its duty to act in good faith in pursuit of the employee's interests.

A DFR claim is thus, in its essence, a claim by an employee that his union has exercised its statutory discretion contrary to the obligations that govern—and limit—that discretion and in so doing has violated his rights as

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[5] In traditional trust law, of course, the initial grant of authority comes about through the action of a private settlor, while here the initial grant is contained in a statute and is conditioned on an affirmative majority decision of the relevant employee group.

a beneficiary of the grant of discretionary authority to the union. *See, e.g.*, Cox, *Rights Under A Labor Agreement*, 69 Harv.L.Rev. 601, 619-620, 645-646, 652 (1956) (the "fairest and most practical approach" to understanding the relationship of union, employees and employer is by analogy to "the traditional trust" in which "the trustee can enter into binding settlements . . . and the beneficiary's remedy is to show a breach of fiduciary duty"); Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich.L.Rev. 1, 21 (1958) (the union's duty is modeled on that of a trustee charged with acting "for the benefit of a large and ever changing group of beneficiaries who may have divergent interests"); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal.L.Rev. 663, 819 (1973) (comparing duty of fair representation litigation to traditional trust litigation); Jones, *The Origins of the Concept of the Duty of Fair Representation*, in The Duty of Fair Representation (J. McKelvey, ed. 1977), at 27-28, 42 (duty of fair representation is rooted in "law of trusts and fiduciary obligations").

The law of trusts, of course, was developed *solely* in the courts of Equity and has continuously remained within the province of Equity. *See* G. Bogert & G. Bogert, Law of Trusts and Trustees, § 870 (rev. 2d ed. 1982) ("The court of equity first recognized the trust as a legal institution and has fostered and developed it, . . . beneficiary's remedies are equitable in origin and depend upon the application of equitable principles"); 3 A. Scott, Law of Trusts, § 797 (4th ed. 1987) (trust relationships "are, and have been since they were first enforced, within the peculiar province of courts of equity"); Restatement (Second) of Trusts, § 197 (with narrow exceptions "the remedies of the beneficiary against the trustees are exclusively equitable").

Thus, since claims relating to a trustee's abuse of his discretion were equitable, such claims have not been, and

are not now, tried to a jury. G. Bogert & G. Bogert, The Law of Trusts and Trustees, *supra*, § 870, at 97; 3 A. Scott, Law of Trusts, *supra*, § 197.2 at 193.

2. The similarities between duty of fair representation claims and traditional trustee breach of fiduciary duty claims can be seen even more clearly by examining the nature of "hybrid" duty of fair representation suits, such as the hybrid action initially filed in this case.

In a series of cases, this Court has endorsed the joinder into one action of a duty of fair representation claim against a union and a claim against an employer under § 301 of the LMRA, 29 U.S.C. § 185, for a breach of the collective bargaining agreement. *See Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976); *Bowen v. Postal Service*, 459 U.S. 212 (1982); *DelCostello v. Teamsters*, *supra*. As we will show, the basic structure of this hybrid claim has, in large part, been "borrowed" from trust law.[6]

We begin with a brief review of the normal factual context that gives rise to a "hybrid DFR/§ 301 action". Hybrid actions involve an employee working under a collective bargaining agreement between the union and the employer that provides for a private grievance settlement mechanism. In such a grievance mechanism, the union, as exclusive representative of the employees, will normally retain some degree of discretion to pursue or settle grievances, and the agreement usually provides that the outcome of the grievance mechanism will be final and binding.

[6] Although respondents' original suit had joined the employer, McLean, as a co-defendant, McLean's case is no longer part of this litigation. *See* n.1, p. 3, *supra*. Any Seventh Amendment rights must thus rest on the nature and remedies of the DFR claim itself.

Nevertheless, given that this Court has recognized that the two halves of a "hybrid" action are "inextricably interdependent", and require the same elements of proof, *DelCostello*, *supra*, 462 U.S. at 164-165, an examination of the nature of the "hybrid" case as a whole is instructive as to how properly to characterize the duty of fair representation claim for Seventh Amendment purposes.

The legal context of hybrid litigation is that an agreement between an employer and union providing for such a "grievance machinery . . . is at the very heart of the system of industrial self-government" envisioned by national labor policy. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). *See also* LMRA § 203 (d), 29 U.S.C. § 173(d) ("Final adjustment by a method agreed upon between the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement".) Thus, employees are *not* normally permitted to sue the employer for breach of the collective bargaining agreement, but must instead pursue relief through the collectively-bargained grievance procedure. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). And, "[s]ubject to very limited judicial review, [employees] will be bound by the [grievance procedure's] result." *DelCostello*, *supra*, 462 U.S. at 164 (citing *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960.))

In a hybrid action, an employee asserts that a court should intervene to overturn the grievance machinery's results despite the national labor policy in favor of private dispute settlements between unions and employers. To accomplish this, an employee must prove *both* that the employer breached the agreement *and* that the union breached its duty of fair representation in performing its role as representative in the grievance machinery. Thus, as this Court has explained, both parts of the hybrid action are "inextricably interdependent . . . amounting to 'a direct challenge to the private settlement of disputes under the collective bargaining agreement.'" *DelCostello*, *supra*, 462 U.S. at 164-165 (quoting *United States Parcel Service v. Mitchell*, *supra*, 451 U.S. at 66 (Stewart, J.,

concurring)). And, accordingly, the Court has made clear that to prove his case the employee must prove both breaches:

> "To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." . . . The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both. [*DelCostello*, *supra*, 462 U.S. at 165 (quoting *United Parcel Service v. Mitchell*, *supra*, 451 U.S. at 66-67 (Stewart, J., concurring)).]

The hybrid action, like the duty of fair representation action in general, thus rests on the fact that a union has been entrusted with discretion on behalf of the employee group as a whole. The hybrid action is, in essence, the vehicle for examining the union's exercise of that discretion in negotiating agreements with the employer and in enforcing employee claims under those agreements. Thus, not surprisingly, just as the DFR concept is rooted in trust, the structure of a hybrid DFR/§ 301 action is quite similar to a traditional trust action in which an individual beneficiary complains that a trustee has improperly failed to pursue claims against a third party on the beneficiary's behalf.

In trust law, as a general matter, trust beneficiaries may *not* independently pursue beneficial claims against third parties, but must rely instead on the discretion of the trustee regarding pursuit of such claims. In this regard, the trustee, in essence, exercises a right of exclusive representation. *See* 4 A. Scott, *supra*, § 282 at 27 ("[I]t is for the trustee and not for the beneficiaries to sue. . . . As between the beneficiaries and the outside world, it is the trustee who represents the estate and the beneficiaries of the trust.") This is so, even where the trustee fails to pursue claims, as long as the trustee has made a proper determination that it is prudent to refrain

from doing so. Restatement (Second) of Trusts, § 282(2) (comment e) at 46; 4 A. Scott, *supra*, § 282.1 at 32-33.

But, as in labor law, trust law recognizes that beneficiaries are entitled to have the trustee exercise this discretion properly. The beneficiary is thus no longer bound by the trustee's actions if the claims have not been pursued due to a trustee breach of duty. In such instances, the beneficiary may join the trustee and the third party in one action and assert in his own name *both* the claim of breach of fiduciary duty and the claim of the individual on the underlying obligation. *See* 4 A. Scott, *supra*, § 282.1; Restatement (Second) of Trusts, *supra*, § 282 (2). And, under trust law, both of these claims are treated as equitable because both claims are, in substance, assertions of *beneficial* rights generated by the trust relationship. Assertions of such equitable rights were not recognized at the traditional common law. 4 A. Scott, *supra*, § 281 at 21.

As four members of this Court have noted, the similarity between this sort of trust action and the hybrid DFR/§ 301 action is striking:

> Just as an individual employee may bring a suit for breach of contract against his employer if, but only if, the union has breached its duty of fair representation in determining not to pursue the grievance on the employee's behalf, a trust beneficiary may sue to enforce a contract entered into on his behalf by the trustee if, but only if, the trustee "improperly refuses or neglects to bring an action against the third person". [*Bowen v. Postal Service*, *supra*, 459 U.S. 212 at 243 (White, J., with whom Marshall, Blackmun, and Rehnquist, JJ., join, concurring in part and dissenting in part) (quoting Restatement (Second) of Trusts, § 282(2) (1959)).] [7]

[7] While Justice White's explication of the analogy between trust law and the duty of fair representation is stated in a partial dissent, the majority opinion contains nothing to the contrary. To the extent that the majority resolved the issue in that case—apportion-

And this similarity between the hybrid action and a traditional trust action has been widely noted in the relevant literature.[8]

3. In addition to the two links to trust law just discussed, there is an additional compelling link to historic equity suits. As already noted, a hybrid DFR/§ 301 suit seeks "to set aside a final and binding determination of a grievance, arrived at through the collectively bargained method of resolving the grievance. It is, therefore, *a direct challenge to the private settlement of disputes* under the collective-bargaining agreement." *United Parcel Service, Inc. v. Mitchell, supra,* 451 U.S. at 66 (Stewart, J., concurring) (internal quotation marks and brackets deleted; emphasis added). *Accord DelCostello, supra,* 462 U.S. at 165.

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ment of liability between union and employer—differently from traditional trust rules, the majority did so for reasons of federal labor policy that in its view were not sufficiently taken into account by analogies drawn from *any* other field of law, and not out of any belief that *some* field of law other than trusts offered a closer analogy. *See* 459 U.S. at 224-228. Indeed, one of the authorities cited by the majority for support on its view of apportionment had also noted the close relationship between the hybrid DFR/§ 301 action and the traditional trust suit. *See,* Feller, *A General Theory of the Collective Bargaining Agreement, supra,* 61 Calif.L.Rev. at 805, 819 (cited at 459 U..S at 224 n.8).

[8] *See, e.g.,* Cox, *Rights Under A Labor Agreement,* 69 Harv. L.Rev. 601, 619-620, 645-646, 652 (1956); Cox, *The Legal Nature of Collective Bargaining Agreements,* 57 Mich.L.Rev. 1, 21 (1958); *Jenkins v. Wm. Schluderberg-T.J. Kurdle Co.,* 217 Md. 556, 559-560, 144 A.2d 88, 90 (1958); *Falsetti v. Local 2026, United Mine Workers,* 400 Pa. 145, 161 A.2d 882, 895-896 (1960).

While Professor Cox's 1956 article and the *Jenkins* case were cited approvingly by the Court in *Vaca v. Sipes, supra,* 386 U.S. at 186 n.11, 191, the discussions therein of the trust law analogy were not explicitly noted. *But see* Feller, *A General Theory of Collective Bargaining Agreements, supra,* 61 Calif.L.Rev. at 805 ("*Vaca* essentially adopted the position urged by Archibald Cox in 1956 . . . [that] employees' rights under agreements containing a grievance procedure are entrusted to the union as a fiduciary.")

That being so, a hybrid suit is analogous to a traditional bill in equity seeking to vacate an arbitrator's award for unfairness in the proceedings. *Cf. United Parcel Service v. Mitchell, supra* (barring employee action against employer under § 301 on basis of state statute of limitations for actions to vacate arbitration awards). And in the 18th-century, *only an equity court* could set aside an arbitration award on the basis of circumstances extrinsic to the award itself. *See Wills v. Maccarmick,* 95 Eng. Rep. 736 (2 Wils. K.B. 148) (1763) ("[A] jury . . . cannot find any matter or fact dehors the award: by parity of reason, nothing dehors the award (as partiality is) can be given to them in evidence. . . . In a trial at law . . . there is no precedent at law of any writ to set aside an award.") *Accord Braddick v. Thompson,* 103 Eng. Rep. 374 (8 East, 344) (1807).

As Justice Story stated, "at the common law . . ., no extrinsic circumstances, or matter of fact, *dehors* the [arbitration] award, can be pleaded or given in evidence to defeat it. Thus, for example, fraud, partiality, misconduct, or mistake of the arbitrators, is not admissible to defeat it. But courts of equity will, in all such cases, grant relief, and upon due proofs, will set aside the award." 2 J. Story, Commentaries on Equity Jurisprudence, § 1452 at 704-705 (12th ed. 1877). *Accord,* 4 W.H. Page, The Law of Contracts, § 2551 at 4479 (2d ed. 1920); 2 W. Story, A Treatise on the Law of Contracts, § 1375 at 558 (5th ed. 1874). *See also Burchell v. Marsh,* 58 U.S. (17 How.) 344 (1854) (reviewing bill in equity to vacate arbitration award).

4. We hasten to add that the foregoing is not intended as an argument that the law governing the duty of fair representation should as a general matter be developed simply by following rules in the law of trusts in particular or the law of the equity courts generally. The duty is, we recognize, a creature of federal labor policy, and —while examples from other fields may be instructive—

it is to be developed principally out of the needs and dictates of labor policy. *See* note 7, *supra*.

Our point for present purposes is that the duty of fair representation *was* derived from well-established equitable principles, most especially the principles developed in the law of trusts. And, *for Seventh Amendment purposes*, this is *the decisive* point. Because the rights asserted by an employee in a duty of fair representation suit—or in a hybrid DFR/§ 301 suit—are *beneficial rights* derived from a trust-like fiduciary relationship between the exclusive bargaining representative and the represented employees, such rights are, by their nature, *equitable rights*. In addition, because a hybrid action is an effort to overturn the results of the grievance machinery analogous to a suit in equity seeking to vacate a facially valid arbitration award, it is, again, *equitable* in nature.

Accordingly, no jury trial right is required by the Seventh Amendment's mandate that "[i]n [s]uits at common law . . . the right of trial by jury shall be preserved." These kinds of suits were never entertained "in suits at common law."

B. The Nature of the Remedies Sought.

The Court of Appeals based its decision below principally on the fact that respondents here seek lost wages and lost employee benefits as relief for the alleged union breach of duty. Characterizing it as a close question, that court determined that this claim for "backpay, as a form of money damages, may appropriately be considered legal in nature." Pet. App. 50; 863 F.2d at 339. The District Court rested on similar grounds. Pet. App. 18; 676 F. Supp. at 662-663.[9]

[9] Although the District Court also noted that respondents requested damages for emotional distress, *see* Pet. App. 18; 676 F.Supp. 663, this element of requested relief is no longer relevant to this case. By order dated January 9, 1989, respondents' request for emotional distress damages (along with respondents' request for punitive damages) was dismissed from the amended complaint. The Court of Appeals, which was informed of the pending motion to dismiss these relief claims, did not consider these claims in its decision.

In determining that respondents' claims for lost wages and benefits caused by the alleged DFR breach somehow rendered this action legal rather than equitable, the courts below erred.

1. The plainest evidence that there is nothing inherently "legal" about respondents' claim to be compensated for the monetary losses (e.g., lost wages and benefits) that were allegedly caused by a union breach of duty is that this is precisely the form of *equitable relief* that trust law recognized, and recognizes, as appropriate in cases of a trustee's breach of duty.

The rule of traditional trust law is dispositive of the issue: "It is elementary that a trustee who commits a breach of trust can be required to pay from his own pocket the damages caused to the trust beneficiaries. . . . The measure of liability is usually not a question of great difficulty. The beneficiaries . . . may demand that they be placed in the same financial situation as if the wrong had not been perpetrated." G. Bogert & G. Bogert, Handbook of the Law of Trusts, § 157 at 562, 564 (5th ed. 1973). *Accord* G. Bogert & G. Bogert, The Law of Trusts and Trustees, *supra*, § 862 at 27-32; 3 A. Scott, *supra*, § 2-5 at 237-240; Restatement (Second) of Trusts, § 205.

Thus, while the courts below considered monetary make-whole relief inherently "legal", such relief has in fact been long regarded by trust law as a wholly appropriate—and *wholly equitable*—form of relief to be granted in cases where a trustee's breach of duty causes monetary loss to a beneficiary. *See, e.g., Caffrey v. Darby*, 31 Eng.Rep. 1159 (6 Ves. Jun. 489) (1801) (ordering trustee to make a beneficiary financially whole for losses resulting from trustee's failure to make timely

claims against third party); *Norton v. Steinkopf*, 69 Eng.Rep. 20 (23 L.J. Ch. 35) (1853) (same). *See generally Waterman v. Alden*, 144 Ill. 90, 32 N.E. 972, 975 (1893) ("That courts of chancery have jurisdiction generally, on the application of beneficiaries of a trust fund, to charge trustees with losses occurring through their [breach], is too clear to call for the citation of authorities.").

Since redress for a trustee's breach of duty was exclusively within the province of equity, and since equity provided beneficiaries with make-whole monetary relief in cases of breach, the backpay relief sought here certainly cannot be deemed inherently "legal".

2. Even apart from trust law, the federal courts—including this Court—have repeatedly characterized awards of backpay to an improperly terminated employee as a form of *equitable* relief.

Thus, in *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960) this Court inferred a backpay remedy for retaliatory discharges in violation of the Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3). Although the statute contained no explicit provision for backpay, the Court held that it could be inferred from the traditional powers of an "equity court". *Id.* at 291. *See also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-417 (1975) (describing *DeMario* as resting on " 'the historic power of equity' to award lost wages to workmen unlawfully discriminated against").

Most important is the example of backpay claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, since the scheme of relief under Title VII, like the scheme here, is based on the relevant provisions and policies of the NLRA. *Albemarle, supra*, 422 U.S. at 419 (Title VII's "backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act"). In *Albemarle*, the Court, after extensive

discussion, accepted Congress' characterization of Title VII backpay awards as equitable. *Id.* at 418. And, the Court has subsequently expressly stated that "there is no right to trial by jury in cases arising under Title VII." *Lehman v. Nakshian*, 453 U.S. 156, 164 (1981). *See also Great American Fed. Sav. & Loan Ass'n. v. Novotny*, 442 U.S. 366, 373-374 (1979) (noting that every court of appeals that has confronted the question has concluded that, because of their equitable character, backpay claims under Title VII do not call for a jury trial);[10] *Albemarle, supra*, 422 U.S. at 441-447 (Rehnquist, J., concurring).

Of course, the remedial policies behind the instant duty of fair representation claim are modeled on the NLRA every bit as much as the remedial policies of Title VII, albeit by implication rather than by explicit provision. This could not be clearer. In *Electrical Workers v. Foust, supra*, a case involving a DFR action brought under the Railway Labor Act, this Court explained that in formulating DFR remedial policies, a court's "function . . . is to implement a remedial scheme that will best effectuate the purposes of" the labor statute upon which the DFR action is based, "recognizing that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace." 442 U.S. at 47; *see also id.* at 52 (deciding *not* to permit punitive damages in DFR suits after looking to NLRA and "general labor policy" for guidance and citing *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940) (no punitive relief under NLRA) and *Carpenters v. NLRB*, 365 U.S. 651, 655 (1961) (same)).

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[10] This has always been the uniform view of the courts of appeals. *See e.g., Lincoln v. Board of Regents*, 697 F.2d 928 (11th Cir.), *cert. denied*, 464 U.S. 826 (1983); *Grayson v. Wickes Corp.*, 607 F.2d 1194 (7th Cir. 1979); *EEOC v. Detroit Edison*, 515 F.2d 301 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977); *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975); *Cox v. Babcock & Wilcox*, 471 F.2d 13 (4th Cir. 1972); *Robinson v. Lorilard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); *Johnson v. Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969).

Given that a Title VII backpay claim and a DFR backpay claim are thus both based on the policies and provisions of the NLRA, it would simply defy logic to characterize backpay under Title VII as equitable in nature, and to deny that characterization to the DFR backpay claim in the instant case.

Put simply, DFR backpay, just like Title VII backpay —and NLRA backpay (on which both are based)—is equitable in nature.

3. The considerations that support characterizing backpay as equitable in a hybrid DFR/§ 301 action are, indeed, far stronger than the considerations that have led to that characterization of backpay in Title VII or NLRA actions.

In determining whether a particular form of monetary relief is legal or equitable in nature, a prominent consideration is whether the successful plaintiff is entitled to such relief *as a matter of right*, as was the case in the common-law courts, or whether the relief is subject to the sound discretion of the court, as was the case in Equity. *See Curtis v. Loether*, *supra*, 415 U.S. at 196-197. As this Court has explained, "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). *Compare* 1 C. Pomeroy & J. Pomeroy, A Treatise on Equity Jurisprudence, § 109 at 140 (2d ed. 1892) ("The distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaption to circumstances, and the technical rules which govern their use.")

While both Title VII and the NLRA allow for a narrow area of discretion regarding the award of backpay, that level of discretion is sufficient to classify backpay as equitable under those statutes. *Albemarle*, *supra*, 422 U.S. at 417, 421, 424-425; *see also id.* at 441-447 (Rehnquist, J.

concurring). And there is certainly no reason to believe that relief in duty of fair representation litigation should be subject to *less* discretion. *See Vaca v. Sipes*, *supra*, 386 U.S. at 195 ("The appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach.").

Indeed, as we now show, the remedial decisions that must be made in hybrid DFR/§ 301 litigation entail far more complex discretionary judgments than Title VII. This highly discretionary remedial scheme renders such litigation wholly alien to traidtional common law practice.

a. In *Electrical Workers v. Foust*, *supra*, this Court articulated two essential principles regarding the proper approach to DFR remedies. First, the controlling measure of monetary relief in DFR litigation is "the compensation principle", such that a successful plaintiff should generally be placed in as good a position as he would have been in the absence of a union breach, but not better. 442 U.S. at 49 ("compensation principle [must be used] not only to gauge the sufficiency of relief but also to limit union liability"). Second, DFR remedies must be designed to "best effectuate the purposes of [federal labor policy], recognizing that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace." *Id.* at 47.

Given these principles, the benchmark for evaluating monetary relief in a DFR case like this one is that a successful plaintiff is to be placed in the same position as he would have enjoyed after obtaining an arbitration award in a fairly conducted proceeding under the collective bargaining agreement's grievance machinery. Accordingly, a proper remedy determination must take into account, as best as can be done, the likely remedial approach of a labor arbitrator under the collective bargaining agreement in question.[11]

b. To understand the extent of the discretion exercised by labor arbitrators—and demanded by the parties to a collective bargaining agreement—it is crucial, first, to recognize the important differences between collective bargaining agreements and conventional contracts. As this Court has said:

> The collective bargaining agreement . . . is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . It calls into being a new common law—the common law of a particular industry or of a particular plant. . . . "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages." [*Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 578-579 (1960) (quoting Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1498-1499 (1959)).]

In the context of such agreements, the informed discretion and judgment of arbitrators becomes crucial to the success of the collective relationship, and the parties fully understand—and require—that their agreements

[11] For a court to ignore the likely approach of a labor arbitrator would, of course, violate *both* of the principles articulated in *Foust*. First, arbitration would have been the method for resolving the grievance had there been no union breach of duty. Any effort to place the plaintiff in the position he would have been in had no breach occurred obviously has to account for arbitration. Second, judicial recognition and respect for arbitration is, of course, a central part of the national labor policy, reflecting its central role in facilitating the collective bargaining process. *See, e.g., Steelworkers v. Warrior & Gulf Co., supra*, 363 U.S. at 581; *Paperworkers v. Misco*, —— U.S. ——, 56 U.S.L.W. 4011 (Dec. 1, 1987); *see also* 29 U.S.C. § 173(d).

will be given meaning through the arbitrator's exercise of discretion:

> Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.
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> * * * *
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> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, [and] his judgment whether tensions will be heightened or diminished. [*Warrior & Gulf*, *supra*, 363 U.S. at 581-582.]

Under such an arrangement, all parties intend that equitable discretion be exercised in achieving a proper resolution of grievances. As this Court has noted, DFR litigation may involve "interpretation of critical terms in the collective agreement affecting the entire relationship between company and union." *DelCostello*, *supra*, 462 U.S. at 169 (internal citations omitted). But, the range of remedial discretion involved in even a relatively routine discharge case is extensive.

How arbitrators adjudicate discharge and other discipline cases is examined in detail in Professor Feller's article:

> Both the standards applied to determine the propriety of a discharge and the remedies available if the discharge is found improper are quite different [in labor arbitration than they are under the common law]. . . . In a discharge dispute there may, of course, be a question whether the employee has violated a rule embodied in the agreement or which the agreement authorizes. But under a collective agreement it is understood that this is only the first question and, in most cases, the least important one. The next, and most frequently disputed, issue is whether that violation is of such character as to justify the quantum of punishment imposed. Discharge, which is frequently referred to as "industrial capital punishment," is only one of the possible forms of discipline. [Feller, *A General Theory of the Collective Bargaining Agreement*, *supra*, 61 Calif. L. Rev. at 780.]

As Professor Feller then makes clear, in assessing whether the discipline imposed was merited under the agreement, myraid factors apeparing nowhere in the agreement are considered, and even where discipline of some kind is deemed justified, the arbitrator often exercises purely remedial discretion:

> Taken into consideration in determining whether [the punishment imposed] or some lesser punishment is appropriate are such factors as the seriousness of the offense, the degree of culpability, the amount of damage to the employer, the employee's length of service, his prior disciplinary record. and the likelihood that the offense will be repeated. The predominant philosophy is that "capital punishment" should not be levied until it has been established that the employee will not respond to lesser penalties, and there are obvious analogies to—as well as differences from—the punishment system of the criminal law. Under most agreements, if the employer determines that discharge is the appropriate penalty, an arbitrator to whom the discharge is appealed has authority to modify the penalty and substitute one of the lesser forms of discipline, or to order reinstatement without packpay. [For example, where] an employee . . . refuses to obey a contractually improper order—discipline of some sort is almost always sustained, but discharges almost never. [*Id.* at 780-781.]

Other leading authorities fully agree with this discription of an arbitrator's range of remedial discretion. *See, e.g.*, F. Elkouri & E. Elkhouri, *How Arbitration Works*, 650-690 (describing aribtral approaches to discharge and discipline cases.).

c. The point of this excursion into the theory of labor agreements and labor arbitration is this: the common law's system of "legal" remedies was a system in which defined remedies followed automatically from proof of a defined wrong. In contrast the system for defining and vindicating an individual employee's rights under a collective bargaining agreement is, and has always been, one in which the decisionmaker calibrates the remedy to the precise situation before him (and, indeed, defines the governing "rights and wrongs" through a process of litigating elucidation based on the agreement's words and "the realities of industrial life," *Humphrey v. Moore*, 375 U.S. 335, 358 (1964) (Goldberg, J., concurring in the result)). In this context, the granting of defined remedies as of right, in response to proof of defined wrongs, has no basis in the "make-whole" concept that animates the labor arbitration—and hence the DFR—remedial scheme.[12]

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[12] A number of courts of appeals have, in a variety of circumstances, approved of district court's discretion to issue arbitration orders in the midst of a duty of fair representation case and then to stay further proceedings until an arbitrator's award is issued. *See, e.g., Ames v. Westinghouse Electric Corp.*, 864 F.2d 289 (3d Cir. 1988); *Niro v. Fearn Intern. Inc.*, 827 F.2d 173 (7th Cir. 1987); *Stanton v. Delta Air Lines*, 669 F.2d 833 (1st Cir. 1982); *Ruzicka v. General Motors*, 523 F.2d 306 (6th Cir. 1975). *Compare, Vaca v. Sipes*, *supra*, 386 U.S. at 196 ("an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved").

These decisions have their base in the centrality of the arbitration process to the proper resolution of the issues in, and the proper

Rather, the universal understanding of parties to collective bargaining agreements has been to rely on equitable judgments which "mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles, supra*, 321 U.S. at 329. In this context, the concept of "make-whole" relief calls for processes of evaluation and judgment that have never been the functions of common law courts, and certainly never of juries.

CONCLUSION

For the above stated reasons, the judgment of the Court of Appeals should be reversed.

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---

determination of a remedy in, a hybrid DFR/§ 301 case. The possibility—and often the desirability—of resolving issues in these cases through arbitration orders, of course, illustrates further the need for the extensive flexibility and discretion in adjudicating claims that was an attribute of Equity, and distances these cases even further from the common law model of litigation and relief.

(8)

No. 88-1719

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL NO. 391,

Petitioner,

v.

THOMAS C. TERRY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTION PRESENTED

DO THE RESPONDENTS HAVE A SEVENTH AMENDMENT CONSTITUTIONAL RIGHT TO A TRIAL BY JURY WHEN THEY SEEK BACKPAY AND OTHER COMPENSATORY DAMAGES RESULTING FROM A UNION'S ALLEGED BREACH OF DUTY OF FAIR REPRESENTATION UNDER A STATUTE SILENT AS TO HOW THE REMEDY OUGHT TO BE CHARACTERIZED?

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STATEMENT OF THE CASE

The respondents in this case are truckdrivers who are present and former employees of McLean Trucking Co., (hereinafter "the employer"), a former defendant in this case. The respondents are also present and former members of the petitioner. This case arises out of a change of operations which was implemented by the employer from July to October, 1982. The change of operations involved an alteration of the previous shipping patterns, resulting in the elimination of some of the employer's terminals and a re-organization of other terminals. The number of drivers at some terminals of the employer was increased, and the number at other terminals was decreased to accommodate the shipping changes. Pursuant to the change of operations, 62 truckdrivers were added to the employer's Winston-Salem terminal. (J.A. 25-31).

On or about October 10, 1982, the respondents and others transferred to the Winston-Salem terminal of the employer from various other terminals throughout the country. Upon the theory that transferring active drivers from other domiciles were entitled to follow their freight, a procedure was established whereby these drivers were accorded special seniority rights over senior laid-off drivers in the domicile to which they were transferring. These special seniority rights were to prevail under the procedure until the laid-off drivers were recalled for new work, at which time they would "dovetail" or assume their proper seniority positions. When the respondents transferred to the Winston-Salem terminal of the employer, they established their membership with the petitioner. (J.A. 30-31).

Following their transfer to Winston-Salem, the respondents worked on active status for approximately six weeks. On November 23, 1982, the employer laid off 30 drivers, including many of the respondents. The respondents complained to the petitioner and filed a grievance on December 3, 1982. For the next month prior to the hearing on the grievance, the employer had several recalls and layoffs in Winston-Salem. On each occasion the employer took the position that as soon as a transferee driver was laid off, he lost all special seniority rights which he had acquired under the change of operations procedure. (J.A. 9-10, 31-2).

In January, 1983, the respondents' grievance concerning the order and priority of the layoffs and recalls was heard, first by the Carolina Bi-State Committee on January 12, and finally by the Eastern Conference Joint Area Committee on January 24, 1983. At each of these hearings, the business agent of the petitioner stated that he was taking a neutral position in regard to the respondents' grievance. Among the issues considered at each hearing was the question of the order of recalls after the initial layoff of transferee drivers. The employer, with the agreement of the petitioner, took the position that following a layoff, the transferee drivers lost their special seniority rights and dovetailed into their regular seniority positions in relation to the Winston-Salem drivers who had been inactive at the time of the initial change (hereinafter "Winston-Salem inactive drivers"). According to this interpretation, when a recall was effected, the senior Winston-Salem inactive drivers were the first drivers called back to work, and the transferee drivers, who had moved themselves and their families to Winston-Salem,

remained laid-off after only six weeks of work. (J.A. 9, 32).

The grieving respondents took the position that under the change of operations procedure they should maintain their special seniority until the Winston-Salem inactive drivers were recalled for regular work, at which time they would dovetail into the active board. At the conclusion of the hearing before the Carolina Bi-State Committee, the committee referred the case to the Eastern Conference Joint Area Committee. Following a hearing in Arlington, Virginia, the committee decided this issue in favor of the grieving respondents. Specifically, the committee ordered that the transferee drivers, including the respondents who were laid off after the change of operations was implemented in October, 1982, should be immediately recalled; that the Winston-Salem drivers who had been inactive at the time of the change should be laid off; and that the transferee drivers would maintain their special seniority rights until such time as the former Winston-Salem inactive drivers were recalled for regular work. (J.A. 32).

Following the decision of the grievance committee, the employer recalled the respondents and other transferee drivers. On February 7, 1983, the employer laid off the 30 former Winston-Salem inactive drivers who had been on the inactive list as of October 10, 1982. However, on February 8, 1983, all 30 former Winston-Salem inactive drivers who had been laid off the previous day were called back to work. The effect of this action by the employer was to permit the Winston-Salem inactive drivers to regain their places on the active list ahead of transferee drivers, including the respondents. As a result

of this action on the part of the employer, the respondents and other transferee drivers were placed in precisely the same position as they had occupied immediately prior to the decision which had been rendered in their favor. On February 26, 1983, twenty transferee drivers, including some of the respondents, were again laid off. (J.A. 35-6).

On March 1, 1983, some of the laid-off transferee drivers, including some of the respondents, filed a grievance contending that the actions of the employer in recalling the former Winston-Salem drivers constituted a "subterfuge" of the decision of the Eastern Conference Joint Area Committee of January 24, 1983. At that time, the representative of the petitioner appeared before the committee. After reciting the contentions of the grievants, as well as the contentions of the Winston-Salem inactive drivers, the representative took no further action in the hearing. He failed to present any evidence in connection with the grievance. At the conclusion of the hearing, the committee ruled that the actions of the employer were proper and did not violate the decision of January 24, 1983.[1] (J.A. 36-7).

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[1] In the Statement of the Case of the petitioner's brief, the petitioner refers to the grievance committee which heard the respondents' grievances as an "arbitration panel." Brief of Petitioner, p. 4. In fact, under the Supplemental Agreement which governed grievances of the parties in 1983, there were two committees established to hear grievances at the first and second levels. Each committee was composed of members appointed by employers and unions subject to the agreement. The first committee was designated the Joint Bi-State Area Committee, and if this committee decided a case, then there

(Continued on following page)

Subsequently, there were periodic layoffs and recalls affecting the transferee drivers. Most of the respondents experienced long periods of layoff thereafter, until January, 1986, when the employer filed for bankruptcy.

The respondents instituted this action on July 25, 1983. In their Complaint and Amended Complaint they have alleged that the employer violated their rights under their collective bargaining agreement, change of operations procedure, and decisions of the grievance committees in implementing layoffs and recalls at the Winston-Salem terminal; and that the petitioner breached its duty of fair representation in representing the respondents in connection with their complaints and grievances. (J.A. 25). In their pleadings, the respondents properly demanded a trial by jury on all issues presented pursuant

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(Continued from previous page)

was no further right to appeal. The next level committee was designated the Eastern Conference Joint Area Committee which heard all cases which the Joint Bi-State Area Committee was unable to decide. (J.A. 32, 51-3, 72-3).

In the present case, the first set of grievances filed by the respondents were heard initially by the Joint Bi-State Area Committee, and then referred to the Eastern Conference Joint Area Committee for a final decision. *Id.* The second set of grievances filed by the respondents were heard and decided by the Joint Bi-State Area Committee. At no time were any of these grievances heard by an impartial arbitrator.

In its Brief *Amicus Curiae* filed in support of the respondents, the Teamsters for a Democratic Union have argued this point as an additional basis for preserving the respondents' rights to a jury trial. *See* Brief for Teamsters For a Democratic Union as *Amicus Curiae* Urging Affirmance. The respondents endorse this argument in full.

to Rule 38(b) of the Federal Rules of Civil Procedure. F.R.C.P., Rule 38(b) (J.A. 42). After extensive discovery in the case, the petitioner, as well as the other defendants at that time filed motions for summary judgment. On July 5, 1985, the District Court denied the motions for summary judgment filed by the petitioner and the employer. Thereafter, the employer filed for bankruptcy, and all proceedings with regard to that defendant were stayed; and subsequently, the action against the employer was voluntarily dismissed.

The petitioner filed its Motion to Strike Jury Trial Demand on January 6, 1986. (J.A. 76). On November 10, 1987, the United States District Court denied the petitioner's motion, finding that the Seventh Amendment to the United States Constitution entitled the respondents to a trial by jury on the issues presented in this action. *Terry v. Chauffeurs, Teamsters and Helpers, Local 391*, 676 F.Supp. 659 (M.D.N.C. 1987); Petition Appendix (hereinafter "Pet.App.") A1. In its Order the court certified the issue for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b) (1982) (J.A. 78); and on December 17, 1987, the United States Court of Appeals for the Fourth Circuit granted permission for appeal. (Pet.App. A30). On December 20, 1988, the Court of Appeals filed its opinion upholding the trial court, finding "no functional justification for denying the plaintiffs' Constitutional rights to a jury trial." *Terry v. Chauffeurs, Teamsters and Helpers, Local 391*, 863 F.2d 334, 339 (4th Cir. 1988); Pet.App. A50. On April 18, 1989, the petitioner filed its Petition for Writ of Certiorari, which was granted by this Court on June 19, 1989.

SUMMARY OF ARGUMENT

The Seventh Amendment guarantees a trial by jury for litigants in all "suits at common law, where the value in controversy shall exceed twenty dollars ($20.00)." This constitutional provision has been construed by the most recent cases of this Court to include statutory actions or any other actions presenting legal issues or requesting legal relief. *Curtis v. Loether*, 415 U.S. 189 (1974). In determining whether issues are legal or equitable, this Court has made it clear that neither the procedural form of the action nor an overall characterization of the action should be dispositive. *Ross v. Bernhard*, 396 U.S. 531 (1970). In addition, where there are mixed issues of law and equity, the legal issues must be tried to a jury. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

In *Ross*, the Court articulated a three-part test which can be applied to the present case.

(a) Under the first prong, the pre-merger custom with respect to the issues should be considered. Since an action for breach of duty of fair representation (hereinafter "Section 301" action)[2] is a statutory claim, established by the Court, there is no precise analogy to any common law or equitable form of action. However, in *Vaca v. Sipes*, 386 U.S. 171 (1967), the Court determined that the specific issues to be decided in any Section 301 case are (1)

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[2] Section 301 of the Labor Management Relations Act of 1947, *as amended*, 29 U.S.C. Sec. 185. This action is referred to by the courts as a "Section 301" action, "duty of fair representation action" (DFR), or "hybrid Sec. 301-fair representation" action. For convenience, all such actions which are instituted under Section 301 are referred to herein as Section 301 actions, unless otherwise specified.

whether the union has breached its duty of fair representation to the members; and (2) whether the company has breached its contract or collective bargaining agreement. This Court has since recognized that these issues include common law tort and contract components. *Id.;* and *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983). In the factual context of this case, the Section 301 claim is most closely analogous to a legal malpractice action, which is rooted in the common law. R.E. Mallen and J.M. Smith, *Legal Malpractice,* Vol. I, Ch. 1 (3rd Ed. 1989).

The petitioner compares Section 301 actions to trust actions and actions to set aside arbitration awards, which are based on equitable principles; and argues on the basis of these comparisons that Section 301 claims are equitable in nature, and should be tried by the court. However, the petitioner's comparisons have not been employed by the Court in deciding other issues in Section 301 actions and should not be dispositive of the Seventh Amendment issue in this case. In *Beacon Theatres* and its progeny, this Court emphatically stated that the specific issues to be decided, and not the overall characterization of the action, determine the Seventh Amendment question. Under *Vaca,* the specific issues to be decided in Section 301 actions resemble common law theories.

(b) Under the second prong of the *Ross* test, the nature of specific relief requested must be considered. In this case, the respondents requested monetary damages for backpay and other lost employment benefits, as well as reinstatement and other injunctive and declaratory relief. Since the company is bankrupt, reinstatement and

other equitable relief is no longer possible. Thus, the primary relief still available is compensatory damages.

Historically, monetary damages as compensation was the principal form of relief at common law. Generally, equitable courts did not award monetary damages, except as incidental to equitable actions. J. Story, *Commentaries on Equity Jurisprudence,* Vol. II, Sec. 794 (6th Ed. 1853).

This Court has approved the award of compensatory damages including backpay, in Section 301 actions; and has implied that such damages are a form of legal relief, which follow as a matter of right from proof of the wrongs committed by the union and company. *Bowen v. United States Postal Service,* 459 U.S. 212 (1983).

Section 301 is silent with respect to damages or other types of relief. For this reason, it is distinguishable from Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. Sec. 2000e *et seq.*, and other statutes where Congress expressly provided for equitable remedies. Moreover, there is no policy which calls for the elimination of jury trials in Section 301 actions.

In common law tort and contract actions, backpay is generally considered legal relief. The common law treatment of backpay and monetary damages applies to Section 301 actions.

Finally, the relief requested in this case does not have the characteristics of traditionally equitable relief. Based on *Vaca* and *International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42 (1979), such relief is not discretionary with the court, but follows as a matter of right upon proof of the wrong. Moreover, the monetary relief requested in

this case is clearly not incidental to reinstatement, since reinstatement is no longer available. Finally, backpay is not restitutionary in the context of this case. *Curtis*, 415 U.S. 189.

(c) Under the third prong of the *Ross* test (which has not been mentioned in this Court's recent opinions), the jury has the ability to determine the issues in this case, particularly since the issues of liability and damages have been bifurcated by the district court. (J.A. 78).

Thus, based on *Ross* and other Seventh Amendment cases, the respondents have a right to a jury trial in this Section 301 action. Individual rights to jury trials in Section 301 cases have been upheld, not only by the courts in this case, but by most of the circuit courts which have decided the issue. *See, e.g., Quinn v. DiGiulian*, 739 F.2d 637 (D.C.Cir. 1984).

ARGUMENT

THE RESPONDENTS ARE ENTITLED TO A JURY TRIAL OF THE ISSUES PRESENTED IN THEIR ACTION

A. THE SEVENTH AMENDMENT GUARANTEES THE RIGHT TO A TRIAL BY JURY

The Seventh Amendment to the United States Constitution guarantees to litigants a trial by jury "[in] suits at common law, where the value in controversy shall exceed twenty dollars ($20.00)." In its argument, the petitioner contends that this constitutional right is not applicable to the respondents' action, and therefore, the lower court decisions upholding the respondents' rights should be

reversed. Recent Supreme Court decisions broadly construing the Seventh Amendment in its application under the Federal Rules of Civil Procedure, and specific authority in the lower federal courts applying these principles in fair representation cases, support the respondents' rights to a jury trial in this action.[3] Accordingly, the decision of the Court of Appeals for the Fourth Circuit upholding the respondents' constitutional rights should be affirmed.

1. When Litigants Press Legal and Equitable Claims, the Seventh Amendment Protects the Right to trial by Jury

Since the enactment of the Federal Rules of Civil Procedure, the United States Supreme Court, recognizing the relative flexibility of our merged system of law and equity, has consistently supported the constitutional right to a trial by jury under the Seventh Amendment. In *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), the Court considered the issue in an action for a declaratory judgment. The plaintiff, who operated a movie theatre

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[3] *See, e.g., Minnis v. International Union*, 531 F.2d 850 (8th Cir. 1975); *Cox v. H. Masland & Sons, Inc.*, 607 F.2d 138 (5th Cir. 1979); *Roscello v. Southwest Airlines*, 726 F.2d 217 (5th Cir. 1984); *Quinn v. DiGiulian*, 739 F.2d 637 (D.C. Cir. 1984); *United Transportation Union, Local 74 v. Consolidated Rail Corp.*, 881 F.2d 282 (6th Cir., 1989); *Cook v. National Maritime Union of America*, 617 F.Supp. 1052 (S.D.N.Y. 1985); *Palmer v. Metro-North Commuter R.Co.*, 661 F.Supp. 1178 (S.D.N.Y. 1987); *White v. Anchor Motor Freight, Inc.*, 683 F.Supp. 1177 (W.D.Mich. 1988); *Woods v. Dunlop Tire Co.*, 673 F.Supp. 117 (W.D.N.Y. 1987); *Grider v. Monin*, 637 F.Supp. 324 (M.D.Tenn. 1986); *Contra, Leach v. Pan American World Airways*, 842 F.2d 285, 288 (11th Cir. 1988).

and allegedly had the exclusive right to show "first run" movies in the area, was accused of antitrust violations based on its contract and threatened with legal action by the defendant. The plaintiff, contending that the threats of legal action constituted "duress and coercion" which affected the plaintiff's rights, sought declaratory and injunctive relief. The defendant filed a counterclaim against the plaintiff for the alleged antitrust violations and requested a jury trial. The lower courts found that the plaintiff's action presented traditionally equitable claims which were not triable by a jury, and, acknowledging the fact that resolution of such claims by the court would effectively preclude a trial by jury on common issues asserted in the defendant's legal counterclaims, struck the defendant's demand. This Court reversed. The Court observed that there would be cases where legal and equitable claims were presented in which

> the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial.

359 U.S. at 510. The Court then emphasized

> that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

Id. at 510-11. This Court further observed that when mixed issues are presented the trial court is free to grant equitable remedies based on the jury verdict. *Id.* at 508.

The Court's preference for jury trials, where demanded, in actions in which legal issues are combined with equitable issues was underscored in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). There the plaintiff instituted an action for trademark infringement and breach of contract and requested traditionally equitable remedies of an accounting and injunctions. The defendant demanded a jury trial, and the district court struck its demand, holding that the action was "purely equitable," or alternatively, that any legal issues were "incidental" to the equitable issues. The court of appeals refused to vacate the district court order. This Court reversed the lower court decisions and remanded the action for a jury trial. In addressing the first ground of the district court decision, that any legal issues were "incidental" to equitable issues, this Court noted the decision in *Beacon Theatres*, and reasoned as follows:

> That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as "incidental" to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such "imperative circumstances" [which might override a party's right to jury trial], *Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury.

369 U.S. at 473. Addressing the separate issue of whether any legal issues were presented in view of the plaintiff's request for traditionally equitable relief, this Court

emphasized that "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings" and pointed out that the underlying claims were for trademark infringement and breach of contract, both of which give rise to legal remedies. *Id.* at 477-78.

This Court again addressed this issue in *Ross v. Bernhard*, 396 U.S. 531 (1970), in the context of a shareholders' derivative action brought by stockholders of a corporation against the directors and others for breach of fiduciary duty, breach of contract, and gross negligence. The Court reasoned on the basis of its prior decisions that the Seventh Amendment preserves the right to a jury trial in all actions which could not be characterized as purely equitable or admiralty cases, " 'whatever may be the peculiar form which they may assume to settle legal rights.' " *Id.* at 533, *quoting from Parsons v. Bedford, Breedlove* and *Robeson*, 3 Pet. 433, 447, 7 L.Ed. 732 (1830). The Court elaborated:

> Under [*Beacon* and *Dairy Queen*], where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims. The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.

396 U.S. at 537-38. In a footnote, this Court explained that the "legal" nature of an issue depends on (1) the pre-merger custom in regard to the issue (in law or equity); (2) the remedy sought by the plaintiffs; and (3) "the

practical abilities and limitations of juries." *Id.* at 538, n. 10. Applying this test, the Court concluded that, although a stockholders' derivative action includes some equitable characteristics, its underlying contract and tort components render it essentially an action to enforce legal rights. Therefore, the plaintiffs were entitled to a trial by jury.

2. Even if the Claim Arises from Statute and Provides for Legal Rights and Remedies, the Seventh Amendment Nevertheless Protects the Right to a Trial by Jury

The *Ross* rationale was taken a step further in *Curtis v. Loether*, 415 U.S. 189 (1974), an action under Title VIII of the Civil Rights Act of 1969, *as amended*, 42 U.S.C. Sec. 3612, alleging that the defendants had refused to rent an apartment to the plaintiff because of her race. The district court struck the plaintiff's demand for a jury trial, and the court of appeals reversed.

On appeal, the defendants argued that the plaintiff was not entitled to a jury trial because her discrimination action was created by statute and was not recognized by the common law. The Supreme Court dismissed this contention summarily:

> Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.

415 U.S. at 194. The Court found that the plaintiff's action was a "legal action" under the Seventh Amendment:

> A damages action under the statute sounds basically in tort – the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here – actual and punitive damages – is the traditional form of relief offered in the courts of law.

Id. at 196-97.

This Court has continued its trend of decisions in favor of the constitutional right to trial by jury in its later cases. *See Pernell v. Southall Realty*, 416 U.S. 363 (1974) (where the Seventh Amendment guarantee of a trial by jury was found applicable to an action for the possession of real property); *Tull v. United States*, 481 U.S. 412 (1987) (where the petitioner was found entitled to his constitutional right to trial by jury in a civil penalties action under the Clean Water Act, 33 U.S.C. Sec. 1319(b)); and *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___, 109 S.Ct. 2782 (1989) (where the Court held that the petitioner was entitled to a jury trial under the Seventh Amendment in a fraudulent conveyance action brought by a trustee in bankruptcy since the primary relief requested was that of monetary damages).

3. The Seventh Amendment Protects the Right to Trial by Jury When the Underlying Issues Include a Legal Claim

Clear principles emerge from these decisions which apply in the present context. First, *Beacon Theatres* and *Dairy Queen* emphasize that the procedural changes which came about with the enactment of the Federal Rules of Civil Procedure eliminated much of the "jurisdictional competition" between law and equity. Since the two courts became one, litigants could take all of their claims to a single court which could conduct a trial by the court and jury and could offer a full range of remedies. Accordingly, mixed issues common to equitable and legal claims should be tried by a jury, if properly demanded, except "under the most imperative circumstances," which would be extremely rare. *Beacon Theatres*, 359 U.S. at 511. Second, the determination of the "legal" nature of a claim for Seventh Amendment purposes should not depend on a semantical characterization of the overall action in traditional equitable terms, the procedural form which the action takes, or even on the primary remedy sought. Rather, the courts should focus on the nature of specific underlying issues and consider all of the remedies to which the plaintiff may be entitled in his action. Thus, historically equitable actions, such as derivative stockholders' claims, are triable by a jury, if they include underlying issues based on contract, tort, or other legal theories upon which money damages or other legal relief are sought. *Ross*, 396 U.S. 531. Finally, in accordance with the strong preference voiced by this Court for the Seventh Amendment, all doubts should be resolved in favor of a litigant's constitutional right to a jury trial.

B. SEVENTH AMENDMENT PRINCIPLES GUARANTEE A TRIAL BY JURY FOR CLAIMS FOR BREACH OF DUTY OF FAIR REPRESENTATION

While the Supreme Court has never addressed the Seventh Amendment issue in a fair representation case, the principles developed in the above cases apply tc the theories of such an action and guarantee the rights of the respondents to a jury trial on the facts of this case. The District Court and the Court of Appeals reached this conclusion. The District Court initially observed, as the parties agree, that Section 301, provides no explicit guidance as to the parties' rights to a jury trial. 29 U.S.C. Sec. 185 (1985). Noting the absence of express legislative intent, the court presented the Seventh Amendment issue in this action as follows:

> The question is not whether the rights existed at common law or were created by statute, for it is well established that the Seventh Amendment "requires a jury trial upon demand" where a statute "creates legal rights and remedies, enforceable for damages in the ordinary courts of law." *Curtis v. Loether*, 415 U.S. 189, 194 (1974). Rather, the question is whether the rights plaintiffs asserted in their hybrid Section 301 action are legal or equitable.

667 F.Supp. at 661, Pet.App. A8-9. The District Court applied the three *Ross* factors to determine the "legal nature" of a claim, (1) the pre-merger custom, (2) the nature of the remedy sought, and (3) the "practical abilities and limitations of juries," *Ross*, 396 U.S. at 538, n.10, and determined that the respondents were entitled to a jury trial. First, the respondents are invoking a statutory

remedy under 29 U.S.C. Sec. 185, which was first recognized and later developed by the Supreme Court and which has close analogues in common law contract and tort actions. Second, the respondents, both in their pleadings and in fact, are demanding primarily legal relief. Finally, a jury is capable of finding the facts of this case upon proper instructions by the court.

1. The Underlying Issues in this Action are Legal

According to *Ross*, the first factor to be considered in determining the "legal nature" of claims is the historical treatment of such claims prior to the merger of courts of law and equity. As commentators have noted, this factor can be extremely difficult to apply to modern actions which have no precise counterpart in common law and equity.[4] The District Court in this case gave little weight to this factor, instead emphasizing the second prong of *Ross*, the nature of relief demanded. *Terry v. Chauffeurs, Teamsters and Helpers, Local 391*, 676 F.Supp. at 661; Pet.App. A10. *Accord, see Curtis*, 415 U.S. 189. The Court of Appeals held that this action presents mixed legal and equitable issues which require a jury trial. *Terry*, 863 F.2d at 339; Pet.App. A51. An analysis of the specific issues of fair representation actions indicates that the legal characteristics in such actions dominate.

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[4] *See* F. James and G. Hazard, *Civil Procedure*, pp. 409-58 (3rd Ed. 1985); and Wright and Miller, *Federal Practice and Procedure*: Civil Sec. 2301 *et. seq.* (1971 and *Supp.* 1988). The Supreme Court made the same observation as it articulated the test: "Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply." *Ross*, 396 U.S. at 539, n. 10.

a. The issues in Section 301 cases most closely resemble actions for legal malpractice which sound in tort and contract.

This Court's Seventh Amendment decisions demonstrate that the focus and emphasis in consideration of the first *Ross* factor should be on the specific issues themselves, rather than on any general characterization of the fair representation action. *Bugher v. Feightner*, 722 F.2d 1356 (7th Cir. 1983), *cert. denied*, 469 U.S. 822 (1984). These issues were articulated in *Vaca v. Sipes*, 386 U.S. 171 (1967), as follows: (1) whether the union has breached its statutory duty of fair representation; and (2) whether the employer has breached its contract or collective bargaining agreement with the union. In order for the plaintiff to prove breach of the duty of fair representation by the union, he must present evidence that the union's conduct was arbitrary, discriminatory, or in bad faith. *Id*. These issues raise legal questions sounding in tort and contract.

In recent decisions of the Supreme Court with respect to Section 301, in *Vaca*, *Bowen*, and *DelCostello*, this Court has recognized some resemblance to common law elements in the issues of a Section 301 case. The Court has observed that, although the fair representation action is not squarely aligned with actions for breach of contract or tort claims, Section 301 cases combine elements of such actions within the context of federal labor policy. In *DelCostello*, in fact, the Court reasoned that the "closest state-law analogy for the claim against the union" was for legal malpractice, a legal action with tort and

contract components. *DelCostello*, 462 U.S. at 167.[5] *See also, Minnis v. International Union*, 531 F.2d 850; and *Woods v. Dunlop Tire Corp.*, 673 F.Supp. 117 (W.D.N.Y. 1987).

This Court's recognition that the specific issues in a fair representation case are similar to, albeit not identical with, tort and contract theories supports the respondents' Seventh Amendment analysis. The respondents have alleged that the petitioner has committed conspiracy, willful misconduct, gross negligence and perfunctory conduct, all of which constitute a breach of its duty of fair representation to the respondents. In addition, the respondents have alleged that the employer breached its contract. While not perfect analogies, these theories support the conclusion that the enactment of Section 301 created a legal duty, and a claim for its breach is, at least in part, of a legal nature. As succinctly stated by a district court:

> NMU [the defendant union] analogizes claims for breach of the duty of fair representation to actions for breach of fiduciary duty, which are equitable in nature and which are not entitled to

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[5] Two members of the Court have made this comparison in stronger terms. *See DelCostello*, 462 U.S. at 175 (O'Connor, J., dissenting); and *United Parcel Service, Inc. v. Mitchell*, 451 U.S. at 78 (Stevens, J., concurring in part and dissenting in part). This comparison clearly is the most appropriate in the factual setting of the present case, in which the respondents' DFR claim is based, in part, on the "malpractice" of the petitioner's agent in representing them on their grievances at the hearings. Legal malpractice was historically a common law claim. *See* R.E. Mallen and J.M. Smith, *Legal Malpractice*, Vol. I, Ch. 1 (3rd Ed. 1989); and *Pitt v. Yalden*, 4 Burr. 2060, 98 Eng.Rep. 74 (K.B. 1767).

> jury trial under the Seventh Amendment. Rather than being a creature of common law or traditional equity, however the duty of fair representation is a legal duty created by statute, for enforcement of which an action lies in the courts. In actions seeking to enforce statutory liabilities involving legal rights and remedies, the Supreme Court has said, there is a right to a jury trial absent evidence of contrary congressional intent. [*Citing Curtis v. Loether*, 415 U.S. 189].

Cook v. National Maritime Union of America, 617 F.Supp. 1052, 1053 (S.D. N.Y. 1985). *See also Lucas v. Philco-Ford Corp.*, 380 F.Supp. 139 (E.D.Pa. 1974).

b. The specific issues in this case are not equitable in nature.

In its brief, the petitioner argues, based on *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), that the Section 301 action is rooted in equitable principles derived from the law of trusts. The petitioner also cites this Court's opinions in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and contends that the Section 301 action is similar to an equitable action to vacate an arbitration award.

The petitioner's attempt to convert a Section 301 action to a basic trust action is not supported by *Steele* or subsequent decisions of the Court. In *Steele*, the Court confronted a problem of blatant racial discrimination by the union against black railroad employees in contract negotiations with the employer. Sidestepping the challenge to the constitutionality of the Railway Labor Act, *as amended*, 45 U.S.C. Sec. 151 *et seq.*, on equal protection

grounds, the Court interpreted the language of the Act, in light of its purpose "to impose on the bargaining representative . . . the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." 323 U.S. at 202-3. In the course of its statutory construction the Court observed, without citation, "a principle of general application" that one who is granted the power to act on behalf of another has the responsibility to do so in his interest. *Id.*, at 202. The Court held that the statute imposed a duty of fair representation on the union, the breach of which was actionable in the courts.

The passing observation of the *Steele* Court that one must act responsibly when acting for another does not convert the underlying issues in Section 301 cases to matters of trust law. Since *Steele* this Court has not mentioned trust principles in deciding any of the myriad of other issues which it has confronted in Section 301 cases since 1944.[6] For example, in *Foust*, the Court ruled that punitive damages were not appropriate in Section 301 cases and did not mention the trust comparison, a comparison which would have supported the rejection of this common law remedy. *See Tull v. United States*, 481 U.S. at 422 (punitive damages is a form of legal relief).

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[6] *See* the excellent presentation of the history of such actions in M.H. Malin, with L.A. Schmall, *Individual Rights Within the Union*, Chapt. 8-9 (1988). The authors conclude that "[t]he trend in authority favoring jury trials in DFR actions properly discounts the arguments based on the equitable nature of the duty of fair representation. . . ." *Id.*, at 472.

Similarly, in *Bowen*, the Court confronted the issue of the apportionment of damages between the union and the employer. The majority based its opinion on national labor policy, rejecting the readily available comparison with the law of equitable trusts.[7] In *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), where the issue was the statute of limitations for Section 301 actions, the Court chose as its model the statute of limitations for setting aside an arbitration award. When the same issue was presented again in *DelCostello*, the Court reversed *Mitchell* and held that the appropriate statute of limitations was six months, which coincided with the limitations period for filing an unfair labor charge. In neither case did the Court discuss borrowing the statute of limitations for trust actions or relying on the doctrine of laches for equitable actions.

Similarly, the fact that an arbitration is sometimes involved in Section 301 cases does not convert all such claims to actions to vacate arbitration awards. First, it must be noted that not every Section 301 case involves an arbitration award or a request to vacate such an award.[8] Second, while some Section 301 actions may involve an arbitration award or a grievance committee decision, this

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[7] As stated in the petitioner's brief, in the dissenting opinion in *Bowen*, four members of this Court raised the comparison as a potential basis for deciding the issue of apportionment of damages. *Bowen*, 459 U.S. at 243. *See*, Br. of Pet., p. 19, n. 7.

[8] Indeed, as argued in the *Amicus Curiae* Brief of the Teamsters for a Democratic Union, there is a vast and fundamental difference between the grievance committees appointed by the company and union pursuant to the grievance procedure in this case, and an impartial arbitrator.

Court has noted that proof of the specific issues in the case "removes the bar of the finality provisions of the contract." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976). Thus, the "setting aside" of the decision is automatic upon meeting the *Vaca* standards.[9] In any event, while the Court drew a parallel in *Mitchell* to such an action for statute of limitations purposes, it reversed its decision in *DelCostello*, indicating the limited significance of the comparison.

These cases illustrate that the Section 301 action can be likened to a variety of actions both at law and equity.[10]

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[9] In the lower courts the petitioner advanced this argument under the second part of the *Ross* test, contending that any damage claims were incidental to the respondents' action to vacate the grievance committee decision. The District Court rejected this contention in terms which are pertinent to the present argument:

> Plaintiffs' goal is not to overturn the Joint Bi-State Grievance Committee's arbitration ruling, and in light of McLean's present condition they certainly do not want another crack at arbitration. What plaintiffs do want now is money to replace what they believe they lost because of the wrongdoing of their employer and their Local 391.

676 F.Supp. at 664-5; Pet.App. A25. *See also, White v. Anchor Motor Freight, Inc.*, 683 F.Supp. 117.

[10] Various analogies have been made by the lower courts, none of which "has provided much protection for the individual employee." *See* J.E. Sanchez, "Jury Trials in Hybrid and Non-Hybrid Actions: The Equitable Clean-Up Doctrine in the Guise of Inseparability and other Analytical Problems," 38

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While the Court has drawn upon several comparisons for various purposes, no one analogy has been used consistently for all purposes. To argue that the similarity of a general Section 301 action to a particular equitable action renders all issues in the case equitable for Seventh Amendment purposes grossly exaggerates the significance of the Court's past comparisons.

The primary flaw in the petitioner's general characterization of the fair representation action as "equitable," therefore, is its failure to address the specific issues in such a case. The Supreme Court decisions on the Seventh Amendment, both in their analysis and application, emphasize that the focus should be on the specific issues in the case, particularly where the action in question is of statutory origin and has no precise counterpart in pre-merger law or equity. In fact, in each of the four cases discussed above, *Beacon Theatres, Dairy Queen, Ross* and *Curtis*, the Court expressly avoided any general description of the actions involved, stating emphatically that the "Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." *Ross*, 396 U.S. 538. Applying this rationale, the Court found in *Beacon Theatres*, that however the action was described, there were mixed legal and equitable issues presented by both parties which required

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DePaul L.Rev. 627, 649-50 (1989). This has led Professor Sanchez to conclude that the courts should drop the "futile search for the true nature of the hybrid action, or of its components in non-hybrid suits," and focus Seventh Amendment analysis on the second part of the *Ross* test, the nature of the relief sought. *Id.*, at 683.

a trial by jury on common issues of fact. 359 U.S. at 510. In *Dairy Queen*, the Court held that the plaintiff's characterization of its action as one for an accounting and injunctive relief was not dispositive of the Seventh Amendment issue, since the underlying issues of the action involved breach of contract and trademark infringement for which money damages could be recovered. The Court held that the defendant had the right "to have a jury determine not only whether the contract has been breached and the extent of the damages if any but also just what the contract is." 396 U.S. at 479. In *Curtis*, the Court analyzed the statutory civil rights action for housing discrimination and found that the issues were akin to common law tort actions for breach of duty of innkeepers, defamation, and intentional infliction of emotional distress. 415 U.S. at 195 n. 10.

Finally, in *Ross*, this Court directly addressed the argument advanced by the petitioner in this case. The primary action was a shareholders' derivative action. The Court recognized that such an action was traditionally equitable in pre-merger days. 369 U.S. at 534. However, this Court reasoned that under the facts of *Ross*, the "heart of the action is the corporate claim," which includes legal issues. 369 U.S. at 539. Significantly, the Court upheld the parties' right to a jury trial based on allegations of breach of contract and gross negligence, notwithstanding the allegations of breach of fiduciary obligation. *Id.*

As in *Ross*, it is misleading under Seventh Amendment principles to characterize this case as an "equitable" action. As the Court noted in *Ross*, the duty of a director

of a corporation to its shareholders is a fiduciary obligation rooted in equity. While the connection to equity is not nearly so strong in the Section 301 action, the petitioner argues that it is reason to deny the respondents' constitutional rights to a trial by jury. As in *Ross*, this Court should look beyond this characterization, and consider the specific issues in this case. Because these issues resemble common law issues, the first factor of the *Ross* test weighs clearly in favor of the respondents.

2. The Plaintiffs in this Action for Breach of Duty of Fair Representation Seek Legal, Not Equitable, Relief

Under the second prong of the *Ross* test, the determination of the "legal" nature of a claim depends on the nature of the relief requested. The nature of a claim will be viewed as legal if the remedies are considered legal. In their Complaint, the respondents have requested legal relief of lost wages, employment benefits, and moving expenses; as well as equitable relief of reinstatement and other injunctive relief. The District Court recognized that the respondents seek a combination of traditionally legal and equitable remedies. *Terry*, 676 F.Supp. at 661; Pet.App. A10-11. However, as noted by the court, intervening circumstances of the employer's bankruptcy rendered the equitable relief of reinstatement impossible. *Id.* Thus, the only remaining remedies respondents seek from the Union are legal in nature. Therefore, since the respondents seek legal remedies, *Dairy Queen*, *Beacon Theatres*, *Ross*, and *Curtis* require that the respondents' rights to a jury trial be upheld.

a. Backpay is generally monetary relief which flows directly from a legal wrong.

Prior to the merger of equity and law, the remedies and relief offered by each court, while somewhat overlapping, had distinguishing characteristics. Legal relief included most claims for compensatory money damages and was relatively fixed, as a matter of right, upon proof of the wrong. J.N. Pomeroy, *A Treatise on Equity Jurisprudence*, Vol. I, Sec. 109 (5th Ed. 1941). Thus, the compensation principle, under which an individual is to be compensated for actual losses, is primarily a product of the common law. J. Story, *Commentaries on Equity Jurisprudence*, Vol. II, Sec. 794 (6th Ed. 1853). *See also Illinois Central R. Co. v. Crail*, 281 U.S. 57 (1930). Remedies granted by the equity courts, in contrast, were distinguished from legal remedies by "their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use." J.N. Pomeroy, *supra*, Sec. 109, at 141. Generally, at equity, money judgments were only allowed when incidental or ancillary to traditional equitable relief. J. Story, *supra*, Sec. 794, at 133.[11]

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[11] The commentator explains this principle as follows:

> "It may be stated, as a general proposition, that, for breaches of contract, and other wrongs and injuries, cognizable at law, Courts of Equity do not entertain jurisdiction to give redress by way of compensation or damages, where these constitute the sole objects

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b. The Supreme Court has recognized the legal nature of relief in Section 301 actions.

While this Court has not characterized backpay in Section 301 actions, it has recognized the wide range of legal and equitable remedies available in such actions. In *Vaca* the Court, reviewing a jury award of damages for the plaintiff's backpay, approved mixed remedies for Section 301 violations, including "appropriate damages *or* equitable relief." 386 U.S. at 196 (emphasis provided). In *Foust*, this Court reviewed a jury's award of punitive damages. The Court concluded that the "compensation principle" in *Vaca* was limiting in that it precluded punitive damages which, by definition, are in excess of actual compensatory damages. The Court reaffirmed *Vaca*'s declaration that "[t]he fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of employees' rights," and specified that "damages *and* equitable relief could be awarded when necessary *to ensure full compensation.*" 442 U.S. at 48-9 (emphasis provided). In a third case discussing damages, *Bowen*, this Court considered the proper apportionment of compensatory damages between the union and the employer. The Court held the union liable for damages caused by its breach of duty, describing compensatory

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of the bill. *For, wherever the matter of the bill is merely for damages, and there is a perfect remedy therefor at law, it is far better that they should be ascertained by a jury than by the conscience of an Equity judge."*

Story, *supra* p. 29, Sec. 794 at 133.

damages as "limited and finite," characteristics of common law relief. 459 U.S. at 227, n. 16. *See also Hines*, 424 U.S. at 562 ("Section 301 suits encompass those seeking to vindicate 'uniquely personal' rights of employees such as wages, hours, overtime pay, and wrongful discharge").

This Court's discussion in the above cases is important for several reasons. While the statute itself, Section 301, is silent with respect to remedies, its interpretation by the Court is clear: an individual who can prove a wrong under the *Vaca* standards has a right to an award of legal relief in the form of actual compensatory money damages, and is also entitled to consideration of equitable relief by the court. Although the Court's language seems plain, the petitioner contends, in effect, that relief under Section 301 is part of a general equitable scheme of remedies which is all, apparently, discretionary with the court. *See* Br. of Pet., p. 24. In characterizing the remedial scheme of Section 301 in this manner, the petitioner attempts to draw support from two statutes or statutory schemes to which equitable principles have been applied. *See* Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. Sec. 2000e *et seq.*; and the National Labor Relations Act, *as amended*, 29 U.S.C. Sec. 151 *et seq.*

c. Backpay is generally a legal remedy, and the statutory language and policies of Title VII and the NLRA render those statutes inapposite to this conclusion.

Neither Title VII nor the National Labor Relations Act gives reason to deny the respondents' constitutional rights to a jury trial in this Section 301 case. With respect

to Title VII, there are critical distinctions, both in the statutory language and in the underlying policy, which make it a particularly inappropriate comparison. Where the statutory language of Section 301 is silent as to remedies, the Congressional intent and policy behind Title VII is strikingly clear. The pertinent statute under Title VII, 42 U.S.C. Sec. 2000e-5(g), states that the court, upon proof of discrimination, "*may* enjoin the respondent" and "order such affirmative relief as *may* be appropriate, which *may* include . . . reinstatement . . . with or without backpay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. Sec. 2000e-5(g) (emphasis provided). Courts construing or relying on this Title VII language have held backpay to be discretionary with the courts and incidental to reinstatement, and thus, equitable relief. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (Title VII case); *Harkless v. Sweeny Independent School District*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969).

In view of this language, it is reasonable to conclude that under Title VII backpay is a form of equitable relief which can be, but does not have to be, granted as an incident of the equitable remedy of reinstatement in the exercise of the discretion of the court. *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979). Many courts have reached this conclusion over the

years, and some have denied jury trials in Title VII actions on that basis.[12]

Courts have found additional support in the substantial legislative history of Title VII in characterizing all remedies under that section as equitable. At the time of the enactment of Title VII, Congress was principally concerned with juror bias, especially in the South, which could emasculate the remedial purposes of the Act. *See, e.g.*, 110 Cong. Rec. 8660 (Remarks of Senator Humphrey) (1969). On numerous occasions, in fact, Congress considered and rejected proposed amendments to grant parties the right to a jury trial in actions brought under Title VII. *See, e.g.*, 110 Cong. Rec. 14,182 (1964) (Senate rejected amendment offered by Senator Thurmond to make violations of Title VII subject to jury trial). Simply put, the legislative history behind Title VII illustrates that Congress was decisively opposed to jury trials in Title VII cases and drafted the statute specifically limiting remedies to those of an equitable discretionary nature, in order to effectuate its intent.

Obviously, there is no similar language in Section 301 and there is no policy either in the legislative or judicial history of Section 301 to avoid jury trials in these cases. As the Court of Appeals recognized in this case, Congress

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[12] *See, e.g., Johnson v. Georgia Highway Express, Inc., supra. Compare,* however, *Beesley v. The Hartford Fire Insurance Co.*, No. 89-AR-1062-S (N.D.Ala. August 14, 1989) (available August 14, 1989 on LEXIS, Genfed library, Dist. file), where a district court has recently recognized a right to a jury trial in Title VII cases based on the Court's latest Seventh Amendment decisions.

did not expressly provide for either legal or equitable relief when enacting Section 301. *Terry*, 863 F.2d at 339; Pet.App. A50. Thus, this Court's response to a similar argument in *Curtis* is pertinent:

> [T]he statutory language on which this characterization [of backpay as an equitable remedy] is based . . . contrasts sharply with Section 812's [of Title VIII] simple authorization of an action for actual and punitive damages. In Title VII cases, also, the courts have relied on the fact that the decision whether to award backpay is committed to the discretion of the trial judge. There is no comparable discretion here: if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount. . . . Whatever may be the merit of the "equitable" characterization in Title VII cases, there is surely no basis for characterizing the award of compensatory and punitive damages here as equitable relief.

415 U.S. at 197.

Neither is there any legislative history behind Section 301 which reveals any Congressional fear of juror prejudice that would seriously impede the enforcement of the statute. And in the development of the fair representation action, which stems from Section 301, this Court, as shown above, has recognized and, in fact, reviewed awards of legal and equitable relief. In these decisions, the Court has imputed to Section 301 what is express in similar statutes in which backpay is clearly considered legal relief. *See* Age Discrimination in Employment Act, *as amended*, 29 U.S.C. Sec. 621 *et seq.* (where the statute providing for remedies in age discrimination cases provides for "legal or equitable relief," 29 U.S.C. Sec. 626(c));

the Fair Labor Standards Act, 29 U.S.C. Sec. 201 *et seq.* ("any employer who violates [the Act] shall be liable for such legal or equitable relief . . . ," 29 U.S.C. Sec. 216(b)); and *Lorillard v. Pons*, 434 U.S. 575 (1978).

The National Labor Relations Act is equally inapposite to the petitioner's challenge of the respondents' rights to a jury trial. The petitioner has implied that the policies underlying the Act – to establish a national labor policy and to promote the private adjustment of contract disputes – also form the bases for Section 301; and that, therefore, the equitable and discretionary remedial scheme which is generally administered by an arbitrator or the Board under the Act should be imputed to the court in Section 301 cases.

It is true, of course, that our national labor policy was established in the Act and is involved in Section 301 actions before the courts. Thus, in developing principles and rules in Section 301 actions, the courts have considered the potential impact of their decisions on national labor policy. This has been particularly true when this Court has confronted the broader questions with potentially far-reaching effects on labor policy under the Act.[13]

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[13] Thus, in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the Court required exhaustion of claims under the grievance procedure of the collective bargaining agreement in order to promote the private adjustment of disputes, which is favored under the Act. In *Vaca*, the Court, while recognizing the importance of the judicial action, established a relatively high standard of proof for individuals seeking to avoid an unfavorable grievance decision for the same reason.

(Continued on following page)

The petitioner attaches extraordinary significance to the observation that the Court has been mindful of national labor policy when interpreting Section 301. From this truism, the petitioner leaps to the conclusion that all relief under the Act is remedial. However, it does not follow, as the petitioner essentially contends, that the courts should be limited to equitable relief or that the remedial scheme should correlate precisely with that of arbitration or the Board under the National Labor Relations Act. The fact that the Court has been influenced by national labor policy is no more dispositive of the issue in this case than the fact that housing discrimination actions under Title VIII in *Curtis* were a creature of civil rights legislation, and thus aligned in general purpose with Title VII. The question in this case is whether backpay is legal relief which follows as a matter of right upon proof of wrongdoing under the *Vaca* standards; or whether such relief should be discretionary with the judge, even in the absence of any Congressional intent to make it discretionary, and treated as an equitable remedy, along with reinstatement and injunctive relief. In its extended discussion of the policies of the NLRA, the petitioner fails to explain

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(Continued from previous page)

In *Foust*, the Court in its decision to eliminate punitive damages in Section 301 actions, was influenced by the perceived impact on "union treasuries" if juries were allowed to award such damages which are, "unpredictable and potentially substantial." *Foust*, 442 U.S. at 50. In *Bowen*, the court considered the signal which might sound to unions if they were not held responsible for any of a plaintiff's damages, and apportioned such damages in a manner consistent with the majority's view of national labor policy.

how jury determinations of Section 301 cases would undermine such policies.

This Court has emphasized that the actions under Section 301 and NLRA are not identical and should not be subject to the same rules and procedures. Indeed, at the very foundation of the *Vaca* decision that fair representation actions are not pre-empted by National Labor Relations Board jurisdiction was the recognition that individual interests are subordinated in Board actions and that the judicial action under Section 301 is needed as "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law," 386 U.S. at 182. For good reason, then, the Court established an identity for the Section 301 action with its own separate policy and philosophy, emphasizing compensation to the individual. In *Foust*, this principle was explained in the context of the different policies of the two actions:

> The compensation principle is also reflected in *Vaca's* refusal to hold unfair representation claims within the exclusive jurisdiction of the National Labor Relations Board. Because the "public interest in effectuating the policies of the federal labor laws, *not the wrong done the individual employee*, is always the Board's principal concern in fashioning unfair labor practice remedies," we feared that denial of a judicial forum might "frustrate the basic purposes underlying the duty of fair representation." *Vaca v. Sipes, supra*, at 182, n. 8, 183, 87 S.Ct. 913 n. 8 (emphasis added). *See also, Glover v. St. Louis-San Francisco R. Co.*, 393 U.S. 324, 328-329, 89 S.Ct. 548, 550-551, 21 L.Ed. 2d 519 (1969).

442 U.S. at 49, n. 12.

This fundamental difference between the purposes of the National Labor Relations Act and Section 301 actions is critical to the issues in this case. In Section 301 actions the focus is and should be on the individual, with a strong emphasis on compensation for any actual damages sustained as a result of the wrongdoing of the union and employer. Such damages, including backpay, should flow as a matter of right from a proven wrong. This Court said as much when, in discussing the employer's liability in fair representation actions, it observed that "the employer discharged the employee wrongfully and remains liable for the employee's backpay." *Bowen*, 459 U.S. at 223. *See also Minnis*, 531 F.2d at 852, where the Eighth Circuit Court of Appeals concluded that "damages resulting from a breach of duty of fair representation do not fall within a discretionary category but may be recovered as of right." Since compensatory damages are normally "limited and finite," they should be easily calculable by a jury under proper instructions from the court. And since backpay compensates the plaintiff for actual economic injury, it does not raise the same concerns which led to the rejection of punitive damages in such actions in *Foust*. In fact, it is inconceivable that jury determinations of backpay could in any way threaten or compromise our national labor policy.

Given the independent nature of Section 301 actions, courts and juries need not mimic labor arbitrators or the National Labor Relations Board in remedying the effects of breaches of the duty of fair representation and of the

collective bargaining agreement.[14] Indeed, if that were the case, there would be little need for an independent judicial action and Section 301 actions would be reduced, essentially, to actions to compel arbitration. This Court in *Vaca* expressly rejected the view that the courts should "inflexibly . . . require arbitration in all cases," pointing out that the range of remedies of an arbitrator is not necessarily the same as the judicial remedies under Section 301; that "the arbitrable issues may be substantially resolved in the course of trying the fair representation controversy," and that in such cases "the court should be free to decide the contractual claim and to award the

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[14] The petitioner essentially contends just that. *See* Br. of Pet., 28-31. There are, of course, a number of factual reasons why neither the court nor a jury could or should exercise the original discretion of the grievance committee. The first problem lies in the passage of time, which the respondents contend was due to the fault of the petitioner. With the passage of time has come critically changed circumstances, particularly in the bankruptcy of the employer. Thus, there is no way to duplicate the circumstances which prevailed at the time of the original committee hearing. Finally, and perhaps most important in this case, the backpay requested by the respondents resulted, for the most part, from the failure of the committee to find a "subterfuge" in the employer's recalls of February 8, 1983. If the committee had upheld the respondents on this issue, the respondents' backpay which is the subject of this analysis would have been minimal, since they would have been reinstated to their special seniority positions. *See* Statement of Case, *supra*. Thus, the substantial part of the backpay which is at issue in this case, and which resulted from the failure of the committee to enforce the change of operations procedure, was not at issue at the time of the hearings.

employee appropriate damages or equitable relief." 386 U.S. at 196. Significantly, the *Vaca* Court did not view the Board's (and presumably, the arbitrator's) "expertise" as critical in fair representation cases. *See Vaca*, 386 U.S. at 181.[15]

In sum, the fact that the Court has established a distinct role for Section 301 actions, and has recognized a wide range of legal and equitable remedies, demonstrates the independence of this action in every respect. Accordingly, the attempts of the petitioner to bind the forms and procedure of the Section 301 actions to other actions is inconsistent with the principles articulated by this Court in *Vaca* and subsequent decisions, and intrudes upon the fundamental rights guaranteed by the Seventh Amendment. As one commentator reasoned:

> Once the Court decided that a DFR plaintiff has a choice of forum, that plaintiff should not be denied a major characteristic of the forum selected, a right to jury trial, nor should that

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[15] The Court made the following observation which is particularly pertinent to the facts of this case:

> [B]ecause these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures.

Vaca, 386 U.S. at 185. *See also* Brief for Teamsters for a Democratic Union as Amicus Curiae Urging Affirmance, filed in this case.

> plaintiff be able to avoid that characteristic where a jury trial is demanded by the defendant.

Malin and Schmall, *supra* p. 25, at 472.[16]

Thus, in the absence of any statutory language limiting available remedies, and in view of the principles articulated by this Court in favor of compensation to the individual, backpay should be considered an element of legal relief. In addition to the *Terry* courts, other courts have apparently reached this conclusion. *See Cox v. H.*

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[16] The other bases on which some courts, primarily in Title VII actions, have found backpay to be equitable and discretionary are not applicable to this case. For example, some courts have viewed backpay as a form of specific performance or restitutionary relief, which is equitable in nature. *See Equal Employment Opportunity Commission v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975). In this case, there has been no unjust enrichment to the employer or to the petitioner which would warrant a restitutionary recovery. As the District Court noted in its opinion: "Back pay represents wages plaintiff was deprived of the opportunity to earn, not money he actually worked for that was withheld from him." 676 F.Supp. at 663, Pet.App. A16. Other courts have classified backpay as incidental to reinstatement and thus equitable. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (Title VII case); *Harkless v. Sweeny Independent School District*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1975). Obviously, in the absence of the statutory language of Title VII or some similar statute, the fact that backpay is "incidental to equitable relief" does not make backpay equitable for Seventh Amendment purposes. *Beacon Theatres*, 359 U.S. 500. *See Sanchez, supra* p. 25-6 n. 10, at 652-3 n. 157. In any event, in view of the employer's demise in this case, reinstatement is not possible. Therefore, whatever the validity of this argument under Seventh Amendment analysis, it is not applicable to this case.

Masland & Sons, Inc., 607 F.2d 138 (5th Cir. 1979); and *Minnis v. International Union*, 531 F.2d 850 (8th Cir. 1980); and discussion of these cases in *Terry*, 676 F.Supp. at 662-3; Pet.App. A15-17.

In accordance with established rules of statutory construction, a review of other statutes which are silent as to relief reveals that courts have generally treated backpay as an element of legal relief. Sutherland, *Statutes and Statutory Construction*, Sec. 50.04, 53 (1987). For example, in considering this issue in an action under 42 U.S.C. Sec. 1983, the First Circuit Court of Appeals stated the following:

> Unlike the calculations required to assess the civil penalty in *Tull*, the computation of back pay normally requires only the addition (or multiplication) of a fixed sum. To paraphrase *Tull*, these are the kinds of calculations traditionally performed by juries. [Citation omitted]. Our analysis leads us to conclude that the determination of back pay as a factor of compensatory damages involves the substance of a common-law right to a trial by jury.

Santiago-Negron v. Castro-Davila, 865 F.2d 431, 441 (1st Cir. 1989). Moreover, backpay has consistently been considered an element or component of legal compensatory money damages at common law. *Hollwedel v. Duffy-Mott Co., Inc.*, 188 N.E. 266, 269 (N.Y. 1933) (the compensatory damages equalled what the employee lost for "not being permitted to work"); *Godson v. MacFadden*, 39 S.W.2d 287, 288 (Tenn. 1931); *Santiago-Negron v. Castro-Davila*, 865 F.2d at 441 (where the court stated: "In tort actions for personal injury tried to a jury, lost wages are invariably treated as being part of compensatory damages"). *See also*

Setser v. Novack Inv. Co., 638 F.2d 1137 (8th Cir. 1981) *cert. denied*, 454 U.S. 1064 (1981) (citing common law cases involving employment relationships where juries traditionally computed backpay as a measure of legal damages).

Based on the above principles, backpay, along with the other compensatory damages sought in this action, is legal relief. Conversely, there is no reason, either statutory or otherwise, why backpay should be considered equitable. Since Congress did not include backpay as a discretionary or equitable remedy under Section 301, such relief, as in common law, remains a form of compensatory money damages, which is legal relief. And with respect to issues concerning such legal relief, this Court has held consistently for three decades that a plaintiff's constitutional right to a jury trial is preserved.

The Fourth Circuit's following conclusions in the present case are based on sound rationale and should be upheld:

> [B]ackpay, as a form of money damages, may appropriately be considered legal in nature. Thus, although a Section 301 action to remedy a violation of a collective bargaining agreement has no counterpart in common law, in our view, the claims for damages asserted here involve legal issues, and, like the Supreme Court in *Curtis*, we find no functional justification for denying the jury-trial right. [Citations omitted].
>
> We review the duty of fair representation increment of the hybrid action in the same light. Like its Section 301 sibling, it is derived from congressional enactment, albeit by judicial interpretation of the statute. *See, e.g., Vaca*, [Citation

omitted]. Further in *DelCostello*, the Supreme Court noted that "the closest state-law analogy" to this action is a state tort malpractice action. [Citation omitted]. In our view, this component of the action is also legal in nature.

As we have indicated, we are unable to structure a bright-line rule stating which specific issues in hybrid Section 301/duty of fair representation cases are subject to the Seventh Amendment requirement of a jury trial. We hold instead that, although many aspects of this action are intertwined, presenting both equitable and legal issues, either party is entitled to a jury trial of identifiable legal issues. We think the dictates of *Beacon Theatres*, *Dairy Queen*, and *Curtis* require that result. . . .

863 F.2d at 339, Pet.App. at A50-51.

3. The Issues Raised in this Action are Issues Typically Entrusted to Juries

Finally *Ross* directs that the practical abilities and limitations of the jury in a fair representation case be considered.

The petitioner has not presented any argument with respect to this factor and indeed, in the most recent Seventh Amendment decisions, this Court has not mentioned it. *See Tull*, 481 U.S. 412. At any rate, the lower courts appropriately dismissed the petitioner's contention below that a jury would not be capable of deciding this case. The District Court noted that there were measures that could be taken to accommodate any such anticipated difficulties and in fact ordered that the issues of liability and damages be bifurcated to accommodate such

concerns. 676 F.Supp. at 665, Pet.App. A28. The experience of the courts with jury trials in Section 301 cases demonstrates that juries, with appropriate instructions from the courts, are quite capable of deciding the issues Section 301 cases.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court of the United States
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CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 391,
Petitioner,

v.

THOMAS C. TERRY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

I. The Nature of the Duty of Fair Representation Action in Relation to Traditional Actions

A. In our opening brief, we began our analysis of the Seventh Amendment question presented here by "compar[ing] the statutory action [involved in this case] to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity," *Granfinanciera v. Nordberg*, —— U.S. ——, 57 U.S.L.W. 4898, 4900 (June 23, 1989) (quoting *Tull v. United States*, 481 U.S. 412, 417-418 (1987)), to ascertain whether the modern action is "analogous to [18th century] 'Suits at common law'" or is "analogous to

18th-century cases tried in courts of equity or admiralty," *Tull v. United States*, 481 U.S. at 417. *See* Brief for Petitioners ("Pet. Br.") at 11-22.

We showed there that the modern duty of fair representation ("DFR") action (derived by implication from § 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(a)), is most analogous to a traditional trust action. In such actions, the equity courts defined and enforced the duties of "trustees"—who had been granted discretionary powers for the benefit of a group of third parties (often including parties with competing interests vis-a-vis one another) and who were not subject to the plenary control of those third parties—and the rights of the trust beneficiaries. As we emphasized, the common law recognized no rights comparable to the equitable rights of such trust beneficiaries. Pet. Br. 12-20. We showed, too, that the DFR action—as an action "to set aside a final and binding determination of a grievance . . . [and thus to] direct[ly] challenge . . . the private settlement of disputes," *United Parcel Service v. Mitchell*, 451 U.S. 56, 66 (1981) (Stewart, J., concurring)—is analogous to a traditional bill in equity seeking to vacate an arbitrator's award for unfairness in the proceedings. Pet. Br. 20-22.

B.(1) It is helpful in sorting out the respondents' rejoinder—and the parties' positions generally—to begin with the points *not* in dispute. Respondents do not dispute that a labor union under NLRA § 9(a) (like a traditional trustee) has been granted discretionary powers for the benefit of third parties,[1] or that the third parties (like traditional trust beneficiaries) may often have competing interests. Nor do respondents dispute that em-

[1] To be sure, respondents repeatedly—and somewhat disingenuously—characterize DFR actions simply as "Section 301 actions," referring to § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, and entirely ignore the action's derivation from the NLRA. *See e.g.*, Resp. Br. 7 n.2. As the decisions of this Court reaffirm, a DFR claim—even when raised with a § 301 claim against an employer—is based on NLRA § 9(a), and is implied from the grant of exclusive representation status found in that provision. *See DelCostello v. Teamsters*, 462 U.S. 151, 164 (1983) ("The suit against the employer rests on § 301, . . . [t]he suit against the union is one for breach of the duty of fair representation, which is implied under the scheme of the National Labor Relations Act."). *See also id.* at 164 n.14; *Communications Workers v. Beck*, —— U.S. ——, 56 U.S.L.W. 4857, 4858 (June 28, 1988); *Electrical Workers v. Foust*, 442 U.S. 42, 46-47 n.8 (1979).

ployees have no legal right to direct the actions of a union with respect to any particular exercise of the union's discretionary authority (just as beneficiaries have no such rights over trustees), and that employees must rely instead on the union's good-faith judgments as to how to advance the employee group's interests and as to how the individual employees' competing interests are to be harmonized (just as beneficiaries must rely on the good-faith judgments of trustees). And, indeed, respondents do not even dispute that the particular kind of claim here—an allegation that the union retained the power to control and settle employee claims and exercised that power in bad faith—is closely parallel to a traditional trust law claim that a trustee failed to properly pursue a beneficiary's equitable claims; nor do they dispute that the two actions are adjudicated in a quite similar way. *Compare* Pet. Br. 12-20 *with* Resp. Br. 22-24.

(2) Respondents do part company from us as to the fair reading of *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), this Court's seminal duty of fair representation decision. In this regard, respondents argue that the *Steele* opinion does not support the DFR-trust analogy. Resp. Br. at 22-23.

The *Steele* Court, in reaching the conclusion that a duty of fair representation is implicit in the Railway Labor Act's grant of exclusive representation powers to unions, relied on the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to

exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed." 323 U.S. at 202. As we have seen, while the law of trusts dealt with the regulation of "a *granted* power to act on behalf of others" there was no such concept at common law. Thus, *Steele*, we believe, is direct support for our position. Respondents raise three objections.

Respondents first characterize this part of the *Steele* opinion as merely a "passing observation of the *Steele* Court." Resp. Br. 23. But a fair reading of the opinion makes clear that the Court was, in this passage, explaining the primary rationale for its holding. The *Steele* Court proceeded by first stating the case, 323 U.S. at 193-197, reviewing the decision below, *id.* at 197-198, and outlining the relevant provisions of the Railway Labor Act and their purposes, *id.* at 198-201. At that juncture the Court faced the question of the "fair interpretation of the statutory language," *id.* at 202-203. In determining that the Act created a fair representation duty the Court relied on two interpretive guides: the *first* is the "general principle" quoted above, *id.* at 202, the second is the Constitution's equal protection guarantee, *id.* Thereafter, the Court turned its attention to the limited nature of the duty, *id.* at 203, and to the procedural and remedial questions raised by a complaint alleging a breach of the duty, *id.* at 203-208. Respondents' "passing reference" characterization is thus utterly unfaithful to the *Steele* opinion's language and structure.

Respondent next urges that *Steele*'s "general principle" should be discounted since the Court did not explicitly cite to the law of trusts. But this assertion does not advance the argument so much as a millimeter. For neither did the Court explicitly refer to the common law. Thus the question here is whether, in fact, the "general principle" referred to in *Steele* is a principle that was developed in the law courts or in the courts of equity. For the reasons

given in our opening brief, we say that the principle was developed in Equity and there alone. Numerous commentators agree. *See* Pet. Br. at 15, 19-20 and nn. 7 & 8 (citing and quoting academic commentary and judicial opinions noting analogy). Indeed, Justice Jackson—a member of the *Steele* majority—in elaborating on the *Steele* principle, later made the connection to the law of trusts *in haec verba*:

> The Act makes the majority union "the exclusive representatives of all the employees in such unit" for bargaining. 49 Stat. 453, § 9(a), 29 U.S.C. § 159(a). . . . While the individual is thus placed wholly in the power of the union, it does not follow that union powers have no limit. Courts from time immemorial have held that those who undertake to act for others are held to good faith and fair dealing and may not favor themselves at the cost of those they have assumed to represent. *The National Labor Relations Act . . . indicates no purpose to excuse unions from these wholesome principles of trusteeship.* [*Trailmobile Co. v. Whirles*, 331 U.S. 40, 68 (1947) (Jackson, J., with whom Frankfurter, J., joins, dissenting on other grounds) (emphasis added). *See also id.* at 68-69 (quoting analogous language in *Steele*).]

Perhaps most to the point, the respondents do *not* point to any common law base for the particular "general principle" on which *Steele*—and the duty of fair representation—rest.

(3) Respondents argue in the alternative that the DFR-trust analogy is undermined because cases after *Steele* have looked to principles of national labor policy, rather than trust law, in developing the fair representation duty. *See* Resp. Br. at 23-24 (citing *Electrical Workers v. Foust*, *supra*, and *Bowen v. Poastal Service*, 459 U.S. 212 (1983) as examples of cases which formulated rules of DFR law from national labor policy rather than from trust analogies). Again respondents argument is beside the point.

As we explained in our initial brief (Pet. Br. 21-22), the argument that, for Seventh Amendment purposes, trust law is the most appropriate analogy to the law of the duty of fair representation does *not* presuppose that trust law and DFR law form a single entity or that the DFR law must, in any particular, follow the preexisting trust law rule. Rather, we proceed on the understanding that Seventh Amendment doctrine requires that modern statutory actions be analogized to more traditional actions in order to determine the jury trial question. At the same time, we recognize that the elaboration of modern statutory law should rest on the intent of Congress and the needs and dictates of Congress's policies. *See United Parcel Service v. Mitchell*, *supra*, 451 U.S. at 63 (duty of fair representation is "creature of labor law"). In the latter regard, trust law analogies are only an instructive starting point, as *Steele* itself shows.

(4) Respondents argue that this Court's decisions regarding the borrowing of a proper statute of limitations for DFR suits show that the proper analogy here is not the law of trusts but the law of "legal malpractice, a legal action with tort and contract components." Resp. Br. 20-21; *see also id.* at 24 (discussing *United Parcel Service v. Mitchell*, *supra*, and *DelCostello v. Teamsters*, *supra*). Respondents focus on two points: first, that in these cases, the Court did not even consider borrowing a trust law statute of limitations; and, second, that the Court—in *refusing* to borrow either the legal malpractice limitations rules or the rules from any other common law action—noted that legal malpractice appeared to be the "closest state law analogy" for purposes of borrowing a limitations period. *DelCostello*, *supra*, 462 U.S. at 167.

We submit that respondents' search for significance in the Court's failure to mention trust law—in deciding a case presenting a very different issue—is *not* a sensible way to find the right analogy here. The Court in *Mitchell* and *DelCostello* was after all conducting an entirely distinct search for analogies from that which is called for in the Seventh Amendment context. Those cases involved inquiries into which modern state law cause of action would supply *policies of repose* that would best effectuate federal labor policy. Thus, such issues as the nature of the federal interest in repose, the length of the state statutory repose periods, and the consistency of repose practices from state to state all were of paramount importance. *See e.g.*, *DelCostello*, *supra*, 462 U.S. at 161, 165-166, 167-168, 170-172. Here, none are relevant.

Given these factors, it is hardly surprising or significant that no party urged a trust law analogy in *Mitchell* or *DelCostello* or that the Court never mentioned such an analogy. While federal labor policy regarding repose places a high priority on the "need for uniformity," clear cut rules, and the relatively rapid disposition of labor disputes (*DelCostello*, *supra*, 462 U.S. at 171; *Mitchell*, *supra*, 451 U.S. at 70-71), the pattern of modern state trust law statutes of limitation serves none of these concerns.[2]

Of at least equal importance, for present purposes the legal malpractice analogy is *not* persuasive in its own terms. A comparison of the relative rights and duties of a client and her lawyer, on the one hand, and the relative rights and duties of an employee and her union, on the other, demonstrates that while the DFR-trust law analogy fits the latter situation, the malpractice analogy does not.

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[2] Although modern trust actions are normally subject to statutes of limitations, rather than to laches, the nature and length of the limitations periods vary widely from state to state. G. Bogert & G. Bogert, The Law of Trusts and Trustees, § 950 (rev. 2d ed. 1982). For example, some states have different limitations periods for express trusts and implied trusts, some have different limitations periods based on the subject matter of the trust, and some assign trust cases to statutes governing "suits in equity" or "causes of action not expressly provided for." *Id.* The length of the periods also vary widely, and some are quite long. *Id.*

For example, a client normally chooses her own lawyer for herself, directs the lawyer's actions within very broad bounds, and is able to terminate the relationship at will. *See generally* 7 Am. Jur. 2d, *Attorneys at Law*, § 168 (2d ed. 1980) (client may terminate attorney-client relationship at any time, with or without cause); *id.* §§ 179, 181 (client has "ultimate control over the subject matter" of a case and may compromise, settle, adjust or dismiss without consent of attorney); *id.* § 213 (scope of attorney's authority is determined by client). Beneficiaries normally have no such rights of control with respect to a trustee. 1 A. Scott, Law of Trusts § 8 (4th ed. 1987). Similarly, individual employees do not have such rights of control with respect to a union.

Moreover, an attorney generally cannot represent classes of clients with varied and possibly divergent interests without each client's consent. 7 Am. Jur. 2d, *Attorneys at Law*, § 197. A trustee, in contrast, may be granted discretionary powers with respect to a class of beneficiaries with competing interests. *See* 1 Restatement (Second) of Trusts, §§ 183, 187, 232, 233 (1959). And a union generally acts for—and must exercise discretion on behalf of—a class of employees with competing interests. *See Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *see generally* Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 21 (1958) (union's duty is modeled on that of a trustee charged with "acting for the benefit of a large and ever changing group of beneficiaries who may have divergent interests").

In essence, then, DFR law, like trust law, regulates a beneficial relationship quite different from one of simple agency, while the lawyer-client relationship is one specialized aspect of the law of agency. *See* 7 Am. Jur. 2d, *Attorneys at Law*, § 119; 1 A. Scott, *supra*, § 8. A lawyer simply has no general autonomy to assess and balance the divergent interests of a diverse class or to

act contrary to the lawful wishes of a client; in contrast, trustees and unions normally do have such autonomy.

C. In our opening brief, we showed that DFR suits like the one here—as actions "to set aside a final and binding determination of a grievance," *Mitchell, supra*, 451 U.S. at 66 (Stewart, J., concurring)—are analogous to 18th century actions to vacate an arbitrator's award for unfairness in the proceedings, and that the latter actions were within the exclusive province of Equity. Pet. Br. 20-21.

Respondents reply that there are DFR actions that do not involve arbitration proceedings. Resp. Br. 24. Although this point is true, we do not see how it counters our argument. To say that other cases do not involve setting aside arbitration awards and hence are not analogous to such equity cases is not to say that this case does not involve setting aside such an award (for it does) or that our analogy does not hold (for, given the facts, it does hold).[3]

Respondents next contend that this case cannot be analogized to an action to set aside an arbitration award in Equity because proceedings before the joint employer-union grievance committees established to resolve disputes under this agreement are not the equivalent of proceedings before a neutral arbitrator. Resp. Br. 24 n.8. *See also* TDU Br. 4-11. Again, respondents miss the point. This Court has time, and time again, treated these two grievance settlement systems as *legally identical*. *See*

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[3] In a passage that can only be described as incomprehensible, respondents urge that this DFR case should not be viewed as analogous to an action to set aside an award because "the 'setting aside' of the [arbitration] decision is automatic upon meeting the [relevant DFR] standards." Resp. Br. 25. Of course, this is a restatement of our point, not its refutation. Because a DFR suit is designed as a means of setting aside a previously final award, the action is precisley analogous to a traditional suit in Equity to remove the bar presented by an arbitration award.

Drivers Union v. Riss & Co., 372 U.S. 517 (1963); *see also DelCostello, supra*; *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976); *Humphrey v. Moore*, 375 U.S. 335 (1964); *cf.* 29 U.S.C. § 203(d).[4]

D. Much of respondents' brief is an effort to build a monument to *Beacon Theatres v. Westover*, 359 U.S. 500 (1959); *Dairy Queen v. Wood*, 369 U.S. 469 (1962); and *Ross v. Bernhard*, 396 U.S. 531 (1970). According to respondents, these decisions should control the outcome of this case. In essence, respondents would have it that these cases create a presumption in favor of characterizing any given cause of action as legal and entitled to a jury trial (Resp. Br. 17); indeed, respondents strongly imply that this presumption requires any cause of action that includes factual issues relating in any way to contract breaches or to torts to be classified as an action at law (Resp. 17, 27-28). Respondents are wrong.

Beacon Theatres, *Dairy Queen* and *Ross* treat with the need to adapt Seventh Amendment law to the merger of law and equity (and the other major procedural reforms) brought about by the 1938 adoption of the Federal Rules of Civil Procedure. In essence, each involved a situation in which, prior to merger, a court of equity might itself have tried (or have enjoined the trial) of *purely legal claims* due to the perceived inadequacies of the procedures available in the pre-merger law courts. In essence, these three cases held that the merger of law and equity

[4] Although this argument was never raised below, it has been repeatedly—*and unsuccessfully*—raised to this Court before. Indeed, in many of the cases cited in text, the same *amicus curiae*, represented by the same counsel has raised virtually the identical argument, and the Court has repeatedly declined to adopt it. *See, e.g., DelCostello, supra*, No. 81-2386, *Amicus Curiae* Brief of Teamsters for a Democratic Union ("TDU"); *Hines v. Anchor Motor Freight, supra*, No. 74-1024, *Amicus Curiae* Brief of PROD, Inc. (a predecessor of TDU).

removed these procedural bases for treating as equitable a cause of action that is *otherwise purely legal* in nature.[5]

Thus, in each of these cases, the Court found a jury trial right only because *clearly legal causes of action* were to be adjudicated, albeit in proceedings in which equitable claims were also to be adjudicated and in which, prior to merger, an equity court might have prevented any jury trial of the legal claims. And, the Court extended the

[5] *Beacon Theatres* involved the joinder of a plaintiff's action to enjoin defendant's prosecution of anti-trust claims with the defendant's counterclaims for anti-trust damages. Both sets of claims presented the same factual issues. The courts below had permitted the trial of the injunction request without a jury before any trial of the legal counterclaims, even though this would effectively prevent any later jury trial of the legal counterclaims. Although a pre-merger court of equity could have tried the equitable claim without a jury and, to protect its jurisdiction, could have enjoined later suits at law, this Court reversed, holding that, after merger, where equitable and legal claims presenting common issues of fact are joined, the right to a jury trial must be preserved by trying the legal claims first.

Dairy Queen involved a complaint alleging breach of contract and trademark infringement and seeking both damages and injunctive relief, including an accounting of defendant's funds. The courts below had denied defendant's jury trial demand on the basis that the legal contract claim for damages was "incidental" to the equitable claim for an accounting. Although pre-merger equity courts could try legal claims "incidental" to equitable claims—and thereby deny jury trials to those claims—this Court reversed, holding that, after merger, legal claims could not be denied a jury trial because they might be deemed "incidental" to related equitable claims.

Ross involved a derivative action by stockholders seeking to assert their corporation's legal claims to damages for breaches of contracts and for negligence. Although only equity courts had allowed derivative standing—and would then go on to try legal claims without juries once granting such standing—the Court held that, after merger, the purely legal claims of the corporation could be tried to a jury, once derivative standing was established.

jury trial right *only to the adjudication of those purely legal causes of action.*[6]

Beacon Theatres, Dairy Queen and *Ross* are thus of no comfort to respondents here. Those precedents affirmed the right to a jury trial of claims that are properly characterized as legal, even where equity courts might have entertained such legal claims for procedural reasons. That is clearly not the situation here. As we have shown, the respondents' cause of action cannot fairly be said to be legal rather than equitable. Nor did the 18th century courts of equity act as fora for analogous claims for reasons of procedure. Rather, the equity courts were the only fora which recognized and enforced the substantive duties of trustees and the substantive rights of trust beneficiaries.

II. The Nature of the Remedies Sought

Respondents urge that because they seek compensation for lost wages and lost employee benefits in this action, the relief must be characterized as legal rather than equitable for Seventh Amendment purposes. Resp. Br. 29-44. There is no such equation of backpay with *legal* relief.

A. In our initial brief, we pointed out that the remedy sought by respondents in this case is precisely the form of equitable relief that trust law recognized—and

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[6] *See Beacon Theatres, supra,* 359 U.S. at 504 (counterclaim alleged anti-trust claims for treble damages to which "the right to trial by jury applies"); *Dairy Queen, supra,* 369 U.S. at 477 (protecting right to a jury trial for "action on a debt allegedly due under a contract," noting that "it would be difficult to conceive of an action of a more traditional legal character"); *Ross, supra,* 396 U.S. at 538-539 & 542 (corporation is real party in interest and thus has a right to jury trial in contract and negligence actions for damages; explicitly refraining from deciding whether any other claims should be tried to jury).

recognizes—as appropriate in cases of a trustee's breach of duty (*see* Pet. Br. 23-24):

> It is elementary that a trustee who commits a breach of trust can be required to pay from his own pocket the damages caused to the trust beneficiaries. . . . The beneficiaries . . . may demand that they be placed in the same financial situation as if the wrong had not been perpetrated." [G. Bogert & G. Bogert, Handbook of the Law of Trusts, § 157 at 562, 564 (5th ed. 1973); *see also* sources cited at Pet. Br. 23-24.]

Respondents' brief contains no answer at all to our point: respondents arguments regarding remedies studiously *ignore* this basic rule of the law of trusts.[7]

B. We also noted that this Court has accepted the characterization of backpay as equitable in a number of federal labor statutes, most prominently in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, whose remedial scheme—like that of the duty of fair representation—is modeled on the NLRA.[8] In so doing, the Court has recognized that these statutes—which rest

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[7] In an effort to support their assertion that "the compensation principle" must be associated with "the common law" (Resp. Br. 29), respondents quote material which is in no way inconsistent with our point that Equity could offer full monetary compensation to redress equitable wrongs. *See* Resp. Br. 29-30 n.11 (quoting 2 J. Story, Commentaries on Equity Jurisprudence, § 794 at 133 (6th ed. 1853). All that Story says is that for "wrongs and injuries cognizable at [the common] law," Equity would not "give redress by way of compensation or damages," since "there is a perfect remedy therefore at law." *Id.* Equitable injuries, however —such as injuries from a breach of trust—were, of course, not cognizable at common law, and full compensation was available only in Equity.

[8] *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 419 (noting that Title VII backpay remedy was modeled on NLRA); *Electrical Workers v. Foust, supra,* 442 U.S. at 47, 52 (noting that design of DFR remedies must effectuate remedial policies of NLRA).

on a general policy of full compensation for injuries—eschew mechanical remedial decisions and instead promote the exercise of remedial discretion as a means of avoiding injustices.[9]

Although respondents admit that where there is room for remedial discretion, backpay may be said to be equitable (Resp. Br. 32), they urge that DFR backpay must be understood as an inflexible entitlement of a different order than backpay under Title VII or the NLRA. Resp. Br. 30-38.

Respondents argue that that the remedial "policies of Title VII and the NLRA [are] inapposite" to DFR actions, because those policies rest on the particular concerns and histories of those statutes. Resp. Br. 31-38. But, again, the "backpay provision [of Title VII] was expressly modeled on the backpay provision of the [NLRA]," *Albemarle, supra*, 422 U.S. at 419. And, of course, the DFR action was also derived—albeit by implication—from the NLRA. As we have noted, in formulating DFR remedial policies, this Court has looked to the NLRA as the principal source of relevant law. *Foust, supra*, 442 U.S. at 49; *see also id.* at 47 (looking to the Railway Labor Act).

Since the DFR, as an implied cause of action, obviously has no statutory language or legislative history other than those of the statutes from which the duty was implied, it is disingenous to urge—as respondents do—

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[9] *See generally Albemarle Paper Co., supra*, 422 U.S. at 413-425; *id.* at 441-447 (Rehnquist, J. concurring). *See also id.* at 424-425 (overall policy of compensation injuries is not undermined by denying backpay where party "prosecuted in eccentric fashion, prejudicial to other party"); *NLRB v. Flite Chief*, 640 F.2d 989 (9th Cir. 1981) (NLRA backpay may be reduced where employee attempted to commit fraud in the proceedings); *American Navigation Co.*, 268 NLRB 426, 417-428 (1983) (same).

that the history and language of the NLRA is irrelevant to this case.[10]

Respondents also point to this Court's statement in *Electrical Workers v. Foust, supra*, 442 U.S. at 48-49, that DFR remedies should seek "to ensure full compensation" and to similar language in other cases, to argue that absolutely no discretion should exist in the awarding of DFR backpay. *See* Resp. Br. 30; *see also id.* at 38 (citing *Bowen, supra*, 459 U.S. at 223). But none of these sources place DFR backpay on any different standard than Title VII or NLRA backpay, since those statutes are also founded on strong policies in favor of "make whole" relief. *See Albemarle, supra*, 422 U.S. at 418-422 (surveying history of Title VII and NLRA policies of "make whole" relief). Indeed, respondents' reliance on *Foust* is wholly misplaced since the *Foust* Court explicitly looked to the "'essentially remedial' objectives of the [NLRA]" as a principal source of duty of fair representation remedial policy. *Foust, supra*, 442 U.S. at 52.

Finally, respondents point to the fact that DFR actions are independent court actions, not subject to the exclusive jurisdiction of the National Labor Relations Board. *See Vaca v. Sipes*, 386 U.S. 171, 182 n.8, 183 (1967). Although this point is repeatedly made by respondents, and urged as a reason why the NLRA's remedial policies should be ignored when characterizing DFR backpay, re-

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[10] Respondents urge that the equitable nature of Title VII backpay is "inapposite" to this case because Congress, in passing Title VII, specifically considered and rejected proposals for jury trials. The duty of fair representation has no similar history, according to respondents. Resp. Br. 33.

Not only does this argument ignore the fact that Title VII remedies were modeled on NLRA remedies, but it also ignores that Congress, when drafting the NLRA, considered and *specifically rejected* the use of juries in that scheme. *See* Pet. Br. 10 (citing legislative history); *cf. Electrical Workers v. Foust, supra*, 442 U.S. at 51 n.14 (noting possible juror bias problems in labor cases); *Automobile Workers v. Russell*, 356 U.S. 634, 651 (1958) (Warren, C.J. dissenting) (same).

spondents never explain why this conclusion follows. *See* Resp. Br. 37-40. There is certainly no inconsistency between allowing an individual a direct action in the courts, and at the same time looking to the NLRA as a model for the remedial scheme the courts are to follow. Indeed, that is precisely what Congress did in Title VII and what this Court did in *Foust*.

C. None of this is to argue, of course, that DFR actions should adopt every arguably analogous NLRA (or Railway Labor Act or Title VII) remedy rule. But against this background, if DFR backpay is to be considered purely "legal," surely there must be some reason rooted in federal labor policy to explain why equitable concerns should play a lesser role in DFR cases than in Title VII or NLRA cases. Respondents give no such reason.

That is not surprising. For there are, in fact, powerful reasons rooted in federal labor policy why equitable remedial discretion should play *a far greater* role in DFR litigation arising from grievance and arbitration processes than in other fields.

Since the normal remedial goal in a case such as this must be to place a successful plaintiff in the position he would have been in had there been no union breach, the remedy must consider the full range of equitable concerns that would have influenced the outcome of a fair arbitration. And, of course, equitable discretion plays a paramount role in an arbitrator's determining the scope of rights—and more important—the scope of remedies under a collective bargaining agreement. Since federal labor policy recognizes that the parties rely on such discretion to elaborate the very meaning of their agreement—and that the stability and success of the bargaining process requires such reliance—it would be particularly inappropriate to mandate that, in DFR litigation, monetary awards must ignore all relevant equitable concerns and instead conform to the traditional and rigid rules of the common law. *See* Pet. Br. 26-30.

Respondents do not deny the centrality of equitable discretion in administering and elaborating the typical collective bargaining agreement and in labor arbitration. Yet, with little analysis, they do deny that a court in crafting a DFR remedy ever needs to take account of what the likely arbitral remedy for the alleged contract breach would have been. Resp. Br. 38-40. In essence, respondents assert that—regardless of the equitable nature of their original claims and of their originally claimed relief—they are now common law claimants with a full right, if successful, to the mechanical awarding of full and traditional common law remedies.

This assertion is, of course, neither good labor policy nor good Seventh Amendment analysis; respondents' arguments should thus be rejected.

CONCLUSION

For the above stated reasons, the judgment of the Court of Appeals should be reversed.

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IN THE
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CHAUFFEURS, TEAMSTERS AND HELPERS,
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Petitioner,
v.
THOMAS C. TERRY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 180,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's activities is the representation of the interests of its member-employers

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36(2). Letters of consent are on file with the Clerk of the Court.

in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation before this Court. E.g., *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. ——, 100 L. Ed. 2d 410 (1988); *Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc.*, 475 U.S. 282 (1986); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986); *Allis Chalmers v. Lueck*, 471 U.S. 202 (1985); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985).

The question presented in this case is whether employees have a Seventh Amendment right to a jury trial in a "hybrid" Section 301/duty of fair representation ("DFR") case. This issue is of vital concern to the Chamber and its members for three reasons. First, such hybrid suits are often brought against employers, either alone or as co-defendants with unions. In either situation, an employer can be liable only if the plaintiff-employee can prevail on both of the determinative issues in such cases—i.e., the union's alleged breach of its duty of fair representation and the employer's alleged violation of the collective bargaining agreement. Thus, employers have an obvious stake in the question of whether such issues must be tried to a jury.

Second, a hybrid § 301/DFR action represents an assault on the exclusive remedies and procedures embodied in grievance-arbitration provisions of collective bargaining agreements. As such, and because principles of exclusivity and finality relating to contractual grievance-arbitration procedures have served employers and the nation well, employers have a legitimate interest in resisting any encroachment on those principles.

Third, employers have an independent interest in the manner in which hybrid § 301/DFR suits are handled

even when those suits are brought solely against unions. Unions faced with the prospect of jury trials in hybrid suits can justifiably expect higher litigation costs connected with such actions. They might also expect that juries may tend to favor the individual over the organization and may not fully appreciate the range of reasonableness that must be accorded unions' actions under our federal labor policies. Thus, unions may become even more reluctant to settle or abandon non-meritorious employee grievances short of arbitration because of the increased costs and uncertainties that would be associated with employee challenges to such decisions in hybrid suits. As a result, grievance-arbitration provisions of collective bargaining agreements will become substantially more costly to employers.

In view of these considerations, it is clear that the issue in this case is just as important to employers as it is to the unions with whom they deal. Accordingly, as a representative of many of those employers, the Chamber submits this brief *amicus curiae* in support of the Petitioner.

SUMMARY OF THE CASE

This hybrid § 301/DFR case was commenced in 1983 by a group of employees of McLean Trucking Company ("McLean") who had recently transferred to McLean's terminal in Winston-Salem, North Carolina. The employees alleged that McLean had violated its collective bargaining agreement by manipulating the contractual layoff and recall procedures in such a way as to give job preference to other Winston-Salem employees. Pet. App. 33-35. In addition, the employees alleged that Teamsters Local 391 ("the Union") had acquiesced in McLean's violation of their contract rights and had failed to fairly represent them in the contractual grievance and arbitration proceedings that resulted in a determination that McLean did not violate the contract. *Id.*

Based on these alleged facts, the employees contended that the arbitration awards finding no contract violation should be set aside and that they were entitled to injunctive and monetary relief against both McLean and the Union. Specifically, the complaint sought declaratory and injunctive relief, reinstatement, lost wages and benefits, punitive damages, damages for emotional distress, and attorney's fees and costs. *Id.* at 35. The claims for punitive and emotional distress damages were subsequently struck by the district court. Petition at 7.

As it stands before this Court, the instant case presents only one defendant and one issue—whether the plaintiff-employees have a right to a jury trial on their claims against the Union. McLean was voluntarily dismissed from the suit after the district court stayed all proceedings as to McLean because the company filed a bankruptcy petition. Petition at 6 n. 1. The jury trial issue comes to the Court via the Fourth Circuit's conclusion, on interlocutory appeal, that the Seventh Amendment of the Constitution ensures the employees' right to a jury trial on their claims. Pet. App. at 32-52.

SUMMARY OF ARGUMENT

The history and nature of hybrid § 301/DFR actions establishes a background supporting the inevitable conclusion that such actions are equitable rather than legal in nature; that the remedies to be sought and awarded are equitable; and that the care required of the trial court in order to ensure that such actions do not disrupt important labor policies is not likely to be found in the jury room.

Hybrid § 301/DFR actions provide a limited means by which employees can avoid the finality and exclusivity of the contractual grievance-arbitration procedures that are so favored in our nation's labor policy. Whether viewed as unitary claims or separate § 301 and DFR claims, this Court's decisions suggest very strongly that

the closest analogies to hybrid suits are actions in equity which do not require a jury trial under the Seventh Amendment. Indeed, the Court itself has found such actions to be most closely analogous to suits to vacate arbitration awards and unfair labor practice proceedings under the NLRA, both of which are equitable in nature.

Furthermore, the result is the same if the two claims or issues in a hybrid suit are analyzed separately. While the closest analog to a DFR claim is an unfair labor practice proceeding, equitable actions against a fiduciary for a breach of a trust relationship are the closest analog in terms of the actions existing before the merger of law and equity courts. The fair representation duty itself obviously has both statutory and equitable origins, and the union-employee relationship is much more closely akin to a trustee-beneficiary relationship than it is to an attorney-client relationship, in terms of both the autonomy and discretion accorded the fiduciary and the power of the employee-beneficiary to end or modify the relationship. Finally, there are sound labor policy reasons to view DFR claims as equitable in nature. The range of discretion that must be accorded unions under our nation's labor policies dictates that their decisions and actions be judged by the flexible standards that are the hallmark of equity jurisdiction.

The contract claim in a hybrid § 301/DFR action is also equitable in nature. Certainly it cannot be compared to an ordinary breach of contract action at common law. Instead, since the contract claim either overrides or substitutes for an arbitration award, the claim should be viewed as an equitable action to vacate an arbitration award or, alternatively, its legal or equitable nature should be determined by the nature of the arbitration proceeding for which it substitutes. The latter alternative produces a firm conclusion that the claim is equitable, because an arbitrator's role in interpreting collective bargaining agreements is of a quintessentially equitable nature.

The remedies available in hybrid suits are also equitable in nature. Certainly the fact that monetary relief is sought does not *ipso facto* make the remedy "legal." Indeed, the monetary make-whole relief available on the DFR and contract claims is the same kind of relief that is available under Title VII of the Civil Rights Act and the National Labor Relations Act, and the remedies under those statutes are acknowledged to be equitable. Furthermore, the parties to collective bargaining agreements containing arbitration provisions can be viewed as having contemplated and agreed upon a regime of equitable rather than legal remedies for any contract violations. Certainly arbitrators possess and employ extraordinarily broad flexibility and imagination in fashioning remedies to meet and accommodate the parties' respective needs and interests. Because the contract claim in a hybrid action is a substitute for this arbitral process, the remedies available for such claims should be considered correspondingly equitable in nature.

Finally, the labor policy implications of hybrid suits counsel against jury trials. Unions must be accorded substantial discretion and latitude in grievance handling in order for the private dispute resolution mechanisms to remain viable. Thus, it is critical that DFR claims be considered and decided with a keen appreciation for the breadth of discretion accorded unions and the labor policies that dictate that latitude. Judges rather than jurors can best perform that function.

ARGUMENT

The Seventh Amendment Does Not Require A Jury Trial On The Labor Relations Issues Presented By Hybrid § 301/DFR Lawsuits

This Court has never addressed the right to a jury trial in private actions involving employee-union-management relations governed by the National Labor Relations

Act ("NLRA"), 29 U.S.C. §§ 151, *et seq.*[2] Indeed, since the NLRA preempts most lawsuits which implicate the rights and obligations under that statute,[3] actions which could possibly present the jury trial issue are limited. However, since the Court has held that employees have a right to pursue the type of hybrid § 301/DFR suits this case represents (*Vaca v. Sipes*, 386 U.S. 171 (1967)), it must now determine whether the Seventh Amendment gives employees the right to have such claims determined by a jury rather than the court.

Before turning to a discussion of the Court's traditional Seventh Amendment tests, however, it is important to consider the source and nature of hybrid § 301/DFR actions in terms of their place in the fabric of our nation's labor laws. These actions derive from both the rights and restrictions of the NLRA (or, as amended by Taft-Hartley, the Labor Management Relations Act ("LMRA")). The Court has long recognized that the fundamental predicate of this statute is to foster a system in which employees, through their collective efforts, may come to the bargaining table and negotiate "a generalized code to govern . . . the whole employment relationship." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960). The outcome of that process—the collective bargaining agreement—thus enjoys an important position in our federal policy. *Id.* at 578 ("The present federal policy is to promote industrial stabilization through the collective bargaining agreement.").

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[2] In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937), the Court did hold that there was no Seventh Amendment right to jury trial in proceedings to enforce the NLRA.

[3] See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748-751 (1985) (describing the two NLRA preemption doctrines which prohibit actions regulating conduct that is arguably prohibited or protected by the NLRA, or conduct that Congress meant to be unregulated by the NLRA).

The Court has also long recognized that the grievance-arbitration provisions of such bargaining agreements are particularly sacrosanct. Since the *Steelworkers Trilogy* decisions in 1960,[4] the Court has emphasized that the express policy of the LMRA[5] "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *American Mfg. Co., supra*, 363 U.S. at 566. Thus, for example, courts may not review the merits of an arbitration award either directly (*Enterprise Wheel & Car Corp., supra*, 363 U.S. at 596) or indirectly through the guise of judging the award under some nebulous public policy standard. *United Paperworkers v. Misco, Inc.*, 484 U.S. ——, 98 L. Ed. 2d 286 (1987).

Consistent with this policy, the Court has made clear that grievance-arbitration provisions can be given their necessary protection only if parties are not permitted to bypass those provisions when they are available. Thus, although Section 301 of the LMRA establishes federal court jurisdiction over suits alleging violations of collective bargaining agreements,[6] the Court long ago held that such suits could not displace the contractual grievance-arbitration procedures:

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[4] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[5] Section 203(d) of the LMRA, 29 U.S.C. § 173(d), states:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application and interpretation of an existing collective-bargaining agreement. . . .

[6] Section 301(a) of the LMRA, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties. . . .

> Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. . . . Union interest in prosecuting employee grievances is clear. . . . Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. . . .
>
> A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."

Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965), *quoting Teamsters v. Lucas Flour*, 369 U.S. 95, 103 (1962).

Hybrid § 301/DFR actions provide a limited exception to this rule which otherwise forecloses resort to the courts when a collective bargaining agreement provides for exclusive grievance-arbitration provisions. In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Court held that an employee would be permitted to pursue his bargaining agreement rights in court, despite exclusive contract procedures, if the employee could prove that the union had breached its duty of fair representation—i.e., had acted in an arbitrary, discriminatory or bad faith manner in failing to process the employee's contractual grievance. 386 U.S. at 190-191. Thereafter, in *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), the Court concluded that the same rule should apply even if there had actually been a final and binding arbitration award denying the

employee's grievance, so long as the employee could show that the union's breach of its duty "seriously undermine[d] the integrity of the arbitral process." 424 U.S. at 567.

Hence, from these precedents, the hybrid § 301/DFR suit had its genesis. In such suits, employees may sue either their employer or their union, or both, but in either situation the elements of the suit are the same[7] and the employee may obtain remedies that would otherwise be foreclosed by the final and exclusive contractual grievance-arbitration provisions. We show below that the nature of the rights and remedies in these lawsuits, as well as federal policy considerations, compel the conclusion that the Seventh Amendment does not require a jury trial in such actions.

A. The Seventh Amendment Standards

The Seventh Amendment to the United States Constitution provides that in "[s]uits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved." The Seventh Amendment right attaches not merely to claims the common law actually recognized, but also to new causes of action in which legal, as opposed to equitable, rights and remedies are to be determined. *Ross v. Bernhard*, 396 U.S. 531, 533 (1970), *citing Parsons v. Bedford*, 3 Pet. 433, 447 (1830). See also *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (Seventh Amendment applies to actions enforcing statutory rights if the statute creates legal, rather than equitable, rights and remedies enforceable in ordinary courts of law).

Thus, the Seventh Amendment question turns on an historical analysis of whether the issues to be decided would have been considered in courts of equity or courts of law prior to the merger of law and equity. *Id.* This determination requires a two-fold analysis:

> First, we compare the . . . action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. . . . Second, we examine the remedy sought and determine whether it is legal or equitable in nature.

Tull v. United States, 481 U.S. 412, 417-418 (1987). Application of these standards leads to the conclusion that a jury trial is not required for hybrid § 301/DFR actions.

B. Hybrid § 301/DFR Actions Are More Analogous To Equitable Rather Than Legal Proceedings

The first prong of the Seventh Amendment test requires a court to assess whether § 301/DFR proceedings are more like pre-merger legal actions or pre-merger equitable actions. This Court itself has twice examined the nature of these actions vis-a-vis their common law or statutory counterparts. *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981); *DelCostello v. Teamsters*, *supra*.[8] The Court's analysis in both cases suggests very

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[7] Although employees typically sue both union and employer in hybrid § 301/DFR suits, employees are free to sue only one of those parties. *DelCostello v. Teamsters*, 462 U.S. 151, 165 (1983). However, the employee may not obtain relief against either party, whether sued singly or collectively, unless he or she can prove both elements of the hybrid claim—i.e., the union's DFR breach and the employer's violation of the bargaining agreement. *Id.*

Thus, every hybrid action contains the same elements no matter who is being sued. While these elements might be termed either "claims" or "issues" depending upon whether employer and union are sued collectively or singly, this brief usually refers to the two "claims" in a hybrid action because typically both parties are sued. However, it should be understood that even if only one party is sued, every hybrid action against an employer contains a "DFR claim" as well as a "contract claim" and, by the same token, every hybrid suit against a union contains a "contract claim" as well as a "DFR claim."

[8] While this inquiry was undertaken for purposes of determining the appropriate statute of limitations for hybrid actions, such a

strongly that, whether viewed as a unitary claim or as separate § 301 and DFR claims, the closest analogies to hybrid suits are actions in equity.

In both *Mitchell* and *DelCostello*, the Court recognized that, whether a hybrid suit is brought against an employer or a union, the suit is an "amalgam," based on both a Section 301 action for bargaining agreement violations and an alleged breach of the duty of fair representation implied under the NLRA. *DelCostello*, 462 U.S. at 158 n. 12; see also *Mitchell*, 451 U.S. at 61-63. Although "as a formal matter" two causes of action are present, "the two claims are inextricably interdependent." *DelCostello*, 462 U.S. at 164.

In *Mitchell*, the Court soundly rejected any suggestion that this "amalgam" suit against an employer could be likened to an ordinary breach of contract action. 451 U.S. at 61-62. Instead, because the suit amounts to a direct challenge to the private settlement of disputes under a collective bargaining agreement, the Court concluded that the suit is "more analogous to an action to vacate an arbitration award than to a straight contract action." *Id.* at 62.

The Court adhered to this conclusion in *DelCostello*, which involved the appropriate statute of limitations in a hybrid action against a union. 462 U.S. at 165. Nevertheless, the Court concluded that, as to the union, a hybrid suit was more akin to an unfair labor practice under the NLRA. 462 U.S. at 169-172. The Court had previously observed in *Mitchell* that a DFR claim "is more a creature of 'labor law' . . . than it is of general contract law" (451 U.S. at 63), and in *DelCostello* it confirmed that conclusion.

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determination normally involves identification and use of the statute of limitations of the most closely analogous state cause of action. *DelCostello*, 462 U.S. at 158.

In short, the Court's previous decisions dealing with hybrid § 301/DFR lawsuits viewed the closest analogy for such suits as either an action to vacate an arbitration award and/or an unfair labor practice proceeding under the NLRA. See also *Leach v. Pan American World Airways*, 842 F.2d 285 (11th Cir. 1988) (hybrid § 301/DFR actions are best analogized to suits to vacate arbitration awards or to unfair labor practice proceedings for purposes of Seventh Amendment analysis). Since both of those latter actions are clearly equitable in nature,[9] jury trials should not be available for hybrid suits under the Seventh Amendment. *Leach, supra.*

Moreover, this conclusion is no different if one focuses on the nature of the underlying claims and issues in hybrid actions, as some cases have suggested must be done under Seventh Amendment analysis.[10] In this regard, it is noteworthy that courts considering the nature of underlying claims in hybrid suits have reached sharply conflicting results—some finding that the contract claim is legal but the DFR claim equitable, some finding the DFR claim legal and the contract claim equitable, and some finding both claims legal or both claims equitable.[11]

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[9] *Leach v. Pan American World Airways, supra,* 842 F.2d at 288 n. 5, 290, and cases cited therein. This Court has itself determined that unfair labor practice proceedings and their remedies are equitable in nature. *NLRB v. Jones & Laughlin Steel, supra,* 301 U.S. at 48-49.

[10] See, e.g., *Deringer v. Columbia Transportation Div., Oglebay Norton Co.*, 866 F.2d 859, 862 (6th Cir. 1989).

[11] For example, *Leach* found that both claims are equitable, whereas the Fifth and Eighth Circuits, prior to this Court's *Mitchell* and *DelCostello* decisions, concluded that both claims are legal. *Cox v. C.H. Masland & Sons, Inc.*, 607 F.2d 138 (5th Cir. 1979); *Minnis v. UAW*, 531 F.2d 850 (8th Cir. 1975). The Sixth Circuit has suggested that contract claims in a hybrid suit are equitable in nature, whereas the DFR claims are legal. *United Transportation Union, Local 74 v. Consolidated Rail Corp.*, —— F.2d ——, 1989 WL 83845, p. 6 (6th Cir. 1989) ("We do not find persuasive the argument that the equitable nature of claims against

The Chamber submits, however, that both aspects of the hybrid action are equitable in nature.

1. *The DFR Claim*

The duty of fair representation claim involved in a hybrid suit clearly has equitable origins. Although the closest specific analog to a DFR claim is obviously the NLRA unfair labor practice that the Court found compelling in *DelCostello*, the fair representation duty arising under that statute itself has roots in equity. First recognized in 1944, the duty derives from the theory that the exclusive representative status granted unions under the NLRA carries with it the responsibility to discharge that representation in a faithful and non-arbitrary manner. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944) (recognizing that a union's duty arises not only from statutory exclusive representative status, but also from the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf."). See also *Hines*, 424 U.S. at 564; *Bowen v. United States Postal Service*, 459 U.S. 212, 226 (1983).

Given these underpinnings, the duty of fair representation plainly bears a striking resemblance to the fiduciary duty in the nature of a trust relationship which has historically been viewed as a creature of equity. See, e.g., *Atwood v. Pacific Maintenance Ass'n*, 432 F. Supp. 491, 497 (D. Or. 1977), *aff'd on other grounds*, 657 F.2d 1055 (9th Cir. 1981) (no right to jury trial because breach of DFR similar to breach of fiduciary duty enforceable in equity). See also Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 21 (1958) (The relationship created by a collective bargaining agreement may be "compared to a trust with a

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an employer compels us to view the derivative claims against a union also to be equitable. . . .").

chose in action as the *res* . . .[and in which] the bargaining representative, which is subject to fiduciary obligations, holds the employer's promises in trust for the benefit of the individuals.").[12]

Moreover, the Chamber submits that the trustee analogy is considerably more apt than the attorney-client analogy that has been favored by some members of the Court. See *Mitchell*, 451 U.S. at 74 (Stevens, J., concurring and dissenting) (DFR claim similar to legal malpractice); *DelCostello*, 462 U.S. at 175 (O'Connor, J., dissenting) (same). In an attorney-client relationship the client maintains ultimate and complete control over all of his or her rights, can direct the attorney which rights should be asserted and how, and can walk away from the relationship should disagreement or dissatisfaction arise.

The union-employee relationship, on the other hand, like the trustee-beneficiary relationship, is entirely different. In these latter relationships, the interests of the employee and beneficiary are placed wholly in the power of the fiduciary, who exercises tremendous autonomy and discretion in how he or she represents those interests. If the employee and trust beneficiary are dissatisfied with how their interests are represented, they are not free simply to reclaim their interests and sever the re-

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[12] Although the Eleventh Circuit did not expressly analogize the DFR claim to a breach of a fiduciary obligation in *Leach*, the court recognized the equitable roots of the DFR doctrine:

> [W]e note that from their inception [DFR claims] have embodied certain traditional notions associated with equity jurisdiction. Equity has been defined as "justice, that is, as ascertained by natural reason or ethical insight, but independent of the formulated body of law."

842 F.2d at 290. Noting the *Steele* Court's explication of the derivation of the fair representation duty, the Eleventh Circuit concluded that "the action involves rights and remedies of the sort traditionally enforced in equity." *Id., quoting Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974).

lationship. Instead, they are limited to attacking the manner in which the fiduciary has exercised his or her discretion. And since the exercise of such discretion cannot be judged by any hard and fast legal rules or precepts, it is necessarily judged in equity. In short, the fair representation duty in a union-employee relationship is, quintessentially, in the nature of a trust.

Finally, there are sound labor policy reasons to view the DFR claims as equitable in nature and determinable by courts rather than juries. As more fully discussed in Section D, *infra*, this Court has often emphasized that our national labor policy requires that unions be accorded substantial discretion and flexibility in their representation activities. E.g., *Vaca*, 386 U.S. at 190-192; *Mitchell*, 451 U.S. at 66, n. 2 (Stewart, J., concurring), *quoting Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) ("Necessarily [a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents."). The limits of that discretion will have to be judged in the myriad of factual circumstances in which DFR claims arise, and will have to be determined with an eye toward the federal labor policy that protects that discretion. These judgments, the Chamber submits, will necessarily be made on the basis of "natural reason or ethical insight . . . independent of the formulated body of law." *Leach*, *supra*, 842 F.2d at 290.

2. *The Contract Claim*

The Chamber submits that the contract claim involved in a hybrid § 301/DFR action is also of an equitable nature. Although the Respondents will undoubtedly contend that such claims are analogous to common law breach of contract claims which are legal in nature, this Court's decisions simply do not permit such a simplistic approach to claims involving collective bargaining agreements which contain binding grievance-arbitration provisions.[13]

First, in both *Mitchell* and *DelCostello* this Court specifically rejected the contention that the contract claim in a hybrid action could be analogized to an ordinary breach of contract action. Because binding grievance-arbitration provisions stand between employees and judicial relief, the suit is "not a straightforward breach-of-contract suit under § 301, as was *Hoosier*, but a hybrid § 301/fair representation claim, amounting to a 'direct challenge to the private settlement of disputes under [the collective bargaining agreement].'" *DelCostello*, 462 U.S. at 165, *quoting Mitchell*, 451 U.S. at 66 (Stewart, J., concurring).

Equally important, moreover, and aside from the necessity of effectively vacating a binding contract resolution, the contract claim, standing alone, should be viewed as involving equitable rights and remedies where the contract provides for binding arbitration. In this regard, the Court's decisions make clear that a collective bargaining agreement cannot be viewed as an ordinary common law contract:

> [The collective bargaining agreement] is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or a particular plant.

United Steelworkers v. Warrior & Gulf, 363 U.S. at 578-579.

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[13] We realize that this Court itself analogized a Section 301 suit to common law breach of contract actions in *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 (1966). However, the collective bargaining agreement involved in *Hoosier* did not contain an arbitration provision and, as shown in the text following this footnote, that analogy is not appropriate when an agreement provides for arbitration.

This point was more recently reiterated in *Bowen v. United States Postal Service*, where the Court rejected a union argument regarding its liability in a hybrid suit because, in the Court's view, the argument

> treats the relationship between the employer and employee, created by the collective-bargaining agreement, as if it were a simple contract of hire governed by traditional common-law principles. . . . Rather, it is an agreement creating relationships and interests under the federal common law of labor policy.

459 U.S. at 220 (footnote omitted).

Aside from the nature of the collective agreement itself, it is also well-recognized that arbitrators play a unique role in administering the bargaining agreement—a role which, the Chamber submits, is the essence of the Chancellor dispensing equity. Indeed, the Court itself has described the role of the Chancellor and the role of the arbitrator in strikingly similar terms. For example, in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), the Court described the Chancellor's role as follows:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

321 U.S. at 329-330. A similar description of the arbitrator's role was offered in *Warrior & Gulf*:

> A collective bargaining agreement is an effort to erect a system of industrial self-government. . . . [It is] "a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their

> application; and some do little more than leave problems to future consideration with an expression of hope and good faith." . . . Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.
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> * * * *
>
> The labor arbitrator performs functions which are not normal to the courts. . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says but . . . such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished.

363 U.S. at 580-582 (citations omitted). See also *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597 ("When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution to the problem.").

These passages demonstrate that an arbitrator's role is one that is closely akin to that of equity jurisdiction, which "eschews mechanical rules . . . [and] depends on flexibility." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), *quoting Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). Just as a collective bargaining agreement can be viewed as "the charter instrument of a system of industrial self-government" (Brennan, J., concurring, in *Steelworkers Trilogy*, 363 U.S. at 570), the arbitrator can be viewed as the Chancellor who sits to fill in the interstices of the written charter and to adjust the relations and actions of the parties as the charter, fairness and equity require.

Seen in this light, employers and unions who enter into collective bargaining agreements with arbitration

provisions have, in a very real sense, committed their rights and obligations under those agreements to a determination in equity. Absent a rule in which all contract claims in hybrid § 301/DFR actions are remanded for arbitration—a rule this Court rejected in *Vaca*, 386 U.S. at 196—the only remaining alternative consistent with the parties' intent and contractual understandings is a determination that alleged violations of the agreement should be determined in equity courts.

C. The Make-Whole Relief In Hybrid § 301/DFR Suits Is Equitable In Nature

The second factor of the Seventh Amendment analysis requires that a court consider the nature of the remedies sought. The Chamber submits that the relief available in this and other hybrid § 301/DFR actions is equitable make-whole relief.

First, the fact that employees in hybrid suits are seeking monetary relief does not automatically mean they are seeking "legal" relief. See *Curtis v. Loether, supra*, 415 U.S. at 196 (award of monetary relief need not be "legal" relief). Indeed, this Court has specifically held that the make-whole relief provided by Title VII of the Civil Rights Act of 1964 is equitable in nature, including the kind of backpay and payment for lost benefits that is typically at issue in hybrid § 301/DFR cases. *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 415-419. So too is the similar make-whole relief under the NLRA, on which Title VII's remedial provisions were modeled. *NLRB v. Jones & Laughlin Steel, supra*, 301 U.S. at 48. In so holding, the Court has expressly recognized "the 'historic power of equity' to award lost wages." *Albemarle Paper Co.*, 422 U.S. at 416.

These cases are pertinent here because the Court has made clear that the purpose of monetary relief for DFR claims in hybrid actions is "to make the injured employee whole." *Electrical Workers v. Foust*, 442 U.S. 42, 49 (1979). See also *Bowen v. United States Postal Service*, 459 U.S. at 222. Given the strong "family resemblance" between DFR claims in hybrid suits and NLRA unfair labor practices involving fair representation (*DelCostello*, 462 U.S. at 170), the make-whole relief available in private DFR actions should be similar to the make-whole relief available under the NLRA—relief that the *Jones & Laughlin Steel* case held to be equitable in nature.

Indeed, the *Foust* Court recognized that the remedies available in DFR suits should be determined by considerations that also govern the statutory remedial scheme. In rejecting the availability of punitive damages in an analogous DFR case under the Railway Labor Act, the Court stated:

> Congress has not specified what remedies are available in these [DFR] suits. Our function, therefore, is to implement a remedial scheme that will best effectuate the purpose of the Railway Labor Act, recognizing that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace.

442 U.S. at 47 (footnote omitted).

Thus, although *Vaca* establishes that the NLRA does not preempt private DFR suits, the Court should be guided by the NLRA remedial scheme in determining the nature of the remedies available in private DFR actions. And this is particularly true inasmuch as the Court has made clear that the preemption doctrine emanates in part from the fact that the "range and nature of the remedies that are and are not available" under the NLRA are integral to the scheme of collective bargaining that statute was intended to foster. *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971). See also *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 287 (1986); *Connell Construction Co. v. Plumbers & Steamfitters Local Union*

No. 100, 421 U.S. 616, 635 (1975).[14] As a consequence, unless the remedies available in private DFR suits are carefully controlled and similar to NLRA remedies, they might run afoul of this Court's preemption principles. *Cf. Motor Coach Employees v. Lockridge*, 403 U.S. at 301 (noting that the Congressional policies the preemption doctrine seeks to promote will be "swallowed up" unless courts considering DFR claims strictly maintain the distinction between unions' honest, mistaken conduct, on the one hand, and deliberate and severely hostile treatment on the other); *Farmer v. Carpenters*, 430 U.S. 290, 304-306 (1977) (NLRA does not totally preempt employee's tort claim against union for intentional infliction of emotional distress, but claim is preempted insofar as it is premised on acts of discrimination covered by NLRA, and furthermore, court must assure damages awarded are not excessive).

In short, the DFR claims in a hybrid suit parallel the DFR claims in statutory unfair labor practice proceedings, and both common sense and national labor policy suggest that the remedies for breach of that duty should be the same. Accordingly, the remedies for hybrid DFR claims should be considered equitable for purposes of Seventh Amendment analysis.

The same conclusion should be reached regarding the remedies for alleged violations of the collective bargaining agreement in hybrid actions. First, such actions al-

[14] Nor is this consideration made less compelling by the *Foust* Court's indication that the "compensation principle" was one of the reasons *Vaca* held private DFR claims not to be preempted. See *Foust*, 442 U.S. at 49 n. 12. The portions of the *Vaca* decision cited by the Court did not express concern that the NLRA could not provide the necessary make-whole relief. Rather, the Court's concern was that the NLRB's General Counsel might refuse to issue DFR complaints in cases where the employee injury was insubstantial, and that such a determination would be within the General Counsel's unreviewable discretion. See *Vaca*, 386 U.S. at 182-183 and n. 8.

ways effectively require vacating arbitration awards or otherwise relieving employees from the finality and exclusivity attaching to the contractual grievance procedure. As pointed out in Section B, *supra*, such remedies are equitable in nature.

Second, the monetary relief available on such claims—backpay and restoration of benefits—can be viewed as equitable for the same reasons that such remedies are equitable in Title VII and NLRA proceedings.

Finally, the parties to collective bargaining agreements containing arbitration provisions can be viewed as having agreed to the imposition of equitable remedies for the same reasons they can be viewed as having agreed to have their contract claims determined in equity proceedings. See Section B, *supra*. In this regard, "[t]he distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaption to circumstances, and the technical rules which govern their use." 1 J. Pomeroy, *Equity Jurisprudence*, § 109, at 140. Equitable remedies, by contrast, are highly flexible and adapt to the circumstances. Thus, "[e]quity eschews mechanical rules . . . [and] depends on flexibility . . .," and an equitable remedial scheme "implicitly recognizes that there may be cases calling for one remedy but not another. . . ." *Albemarle Paper Co. v. Moody*, 422 U.S. at 415-416, 417 (citations and footnotes omitted). See also *Hecht Co. v. Bowles, supra*.

It is clear from these passages that parties who have agreed to contractual arbitration provisions contemplate a regime of equitable rather than legal remedies:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations.

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. at 597.

Moreover, anyone engaged in the arbitral process cannot but be struck by the flexibility that arbitrators in fact bring to bear in order to provide remedies that "do justice" in the particular circumstances of any given grievance. For example, arbitrators routinely convert employee discharges into disciplinary suspensions without pay when they believe that the discharge penalty is too severe under all the circumstances (see, e.g., *General Electric Corp.*, 69 LA (BNA) 707 (Arbitrator Jedel, 1977)), and they often impose far more imaginative remedies in order to protect the parties' respective and legitimate interests in widely varying circumstances. See, e.g., *Gamble-Skogmd, Inc.*, 71 LA (BNA) 1151, 1154 (Arbitrator Weiss, 1978) (where both company and union violated no-strike/no-lockout clause, employees ordered reinstated but without pay because "their hands are not *that* clean," and employees ordered to make up work time lost due to strike by working overtime at straight-time rates insofar as permissible under Fair Labor Standards Act); *3-M Company*, 63 LA (BNA) 114, 118 (Arbitrator Purdom, 1974) (discharged employee reinstated without backpay, but company ordered to make two months' backpay available for grievant to use for purposes of attending remedial educational program; if grievant does not attend educational program, union and employer shall decide how best to use funds to advance educational opportunities of unit employees); *Armstrong Cork Co.*, 56 LA (BNA) 527, 530 (Arbitrator Wolf, 1971) (discharged alcoholic employee reinstated without backpay, but for six months must furnish personnel director evidence that he is regularly attending Alcoholics Anonymous); *Allied Maintenance Co.*, 46 LA (BNA) 1014, 1018 (Arbitrator Sembower, 1966) (employer must reinstate discharged grievant without backpay if and when grievant can supply certificate from

psychiatrist indicating that he has undergone diagnosis and effective treatment).

Thus, in a very real sense, parties agreeing to binding arbitration provisions contemplate that remedies for violating the bargaining agreement will be determined by the arbitrator's application of principles developed in the courts of equity. As a consequence, remedies in the judicial proceedings that displace arbitration in hybrid § 301/DFR suits should likewise be determined in equity.

D. Labor Policy Considerations in Hybrid Cases Counsel Against a Seventh Amendment Right

The Chamber submits that jury determination of DFR claims poses a significant risk to the national labor policies underlying the NLRA. Time and again this Court has emphasized that those policies require that unions be given substantial latitude and discretion in dealing with employee grievances. E.g., *Vaca*, 386 U.S. at 191-193; *Hines*, 424 U.S. at 563-564; *Lockridge*, 403 U.S. at 301; *Foust*, 442 U.S. at 48-52. As the Court observed in *Foust*:

> [U]nion discretion is essential to the proper functioning of the collective-bargaining system. Union supervision of employee complaints promotes settlements, avoids processing of frivolous claims, and strengthens the employer's confidence in the union. Without these screening and settlement procedures, . . . the costs of private dispute resolution could ultimately render the system impracticable.

442 U.S. at 51, *citing Vaca*, 386 U.S. at 191-193. In view of these concerns, the Court has made clear that union DFR liability must be limited to situations in which the union's conduct is "arbitrary, discriminatory or in bad faith," as opposed to merely negligent or inattentive. *Vaca*, 386 U.S. at 190.

As stated by the concurring Justices urging preemption in *Vaca*, however, in applying these standards one is

> concerned with the subtleties of a union's statutory duty faithfully to represent employees in the unit. . . . The nuances of union-employee and union-employer relationships are infinite and consequential, particularly when the issue is as amorphous as whether the union was proved guilty of "arbitrary or bad-faith conduct" which the Court states as the standard applicable here.

386 U.S. at 202-203. Based on this assessment, the concurring Justices concluded that "judgments as to the metes and bounds of the reciprocal duties involved in the relationship between the union and the employee . . . [are] precisely and especially the kind of judgment[s] that Congress intended to entrust to the [NLRB] . . . ." *Id.* at 202.

The *Vaca* majority refused to find the NLRB's jurisdiction exclusive, but the concurring Justices' observations nevertheless remain relevant to the questions before the Court.[15] While judges might be expected to make DFR determinations with a keen eye toward national labor policy and the latitude to be accorded unions, juries, even when properly instructed, may not fully appreciate the wide range of reasonableness that attaches to unions' actions under the nation's labor laws. As a consequence, committing such determinations to juries might prejudice the courts' ability to "strictly maintain" the "dis-

---

[15] *Vaca* held that DFR claims are not preempted by the NLRA under this Court's *Garmon* doctrine, which normally preempts actions regulating conduct that is arguably protected or arguably prohibited by the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Nevertheless, the Court's refusal to find such claims preempted does not mean that the concerns and principles animating the preemption doctrine are entirely irrelevant. Thus, although hybrid DFR claims can obviously proceed, the Court should fashion remedies and procedures relating to such claims that will minimize the risk of violence to national labor policies underlying the NLRA. *See Motor Coach Employees v. Lockridge* and *Farmer v. Carpenters*, as cited *supra* at p. 22.

tinction . . . between honest, mistaken conduct, on the one hand, and severely hostile and irrational treatment, on the other. . . ." *Lockridge*, 403 U.S. at 301. If that is the case, then provision of a jury trial on DFR claims might "swallow up" the "congressional policies Garmon seeks to promote" (*id.*)—i.e., the enhancement of collective bargaining through "uniform application of . . . substantive rules and [avoidance of the] diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . ." *Garner v. Teamsters Union*, 345 U.S. 485, 490 (1953).

Finally, the possibility that juries may consider DFR claims without a proper appreciation for the dictates of national labor policy will also inject increased uncertainty into the litigation of DFR claims. This fact, coupled with the increased litigation costs associated with jury trials, could curtail the union discretion that this Court has found essential to the proper functioning of the collective bargaining system established by Congress. As the Court observed in *Foust*, in rejecting an employee's claim for punitive damages in a DFR suit:

> [T]he threat of punitive damages could disrupt the responsible decisionmaking essential to peaceful labor relations. In order to protect against a future punitive award of unforeseeable magnitude, unions might feel compelled to process frivolous claims or resist fair settlements.

442 U.S. at 51-52. See also, e.g., *Bowen v. United States Postal Service*, 459 U.S. at 241-242 (Justices White, Marshall, Blackmun and Rehnquist, concurring in part and dissenting in part) ("[S]ince the practical consequence of today's [backpay apportionment] is that unions will take many unmeritorious grievances to arbitration simply to avoid exposure to the new breach-of-duty liability, the Court's rule actually impairs the ability of the grievance machinery to provide for orderly dispute resolution."). The same would be true, the Chamber submits, if jury trials are permitted on hybrid DFR claims.

In sum, labor policy considerations counsel great circumspection in determining the rights and remedies to be available under hybrid § 301/DFR suits, as well as great circumspection in committing the issues to a jury. Accordingly, the Court should determine that the rights and remedies are equitable in nature and that they are to be tried to the courts.

CONCLUSION

For the foregoing reasons, the Chamber respectfully submits that the Seventh Amendment of the United States Constitution does not require a trial by jury in hybrid § 301/DFR lawsuits.

Respectfully submitted,

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[redacted], TEAMSTERS AND HELPERS, LOCAL No. 391,
Petitioner,

v.

THOMAS C. TEET *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF OF
NATIONAL RAILWAY LABOR CONFERENCE
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1719

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL NO. 391,
Petitioner,

v.

THOMAS C. TERRY *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

The National Railway Labor Conference ("NRLC") is an unincorporated association whose members include almost all the nation's Class I railroads. Together those railroads employ more than 90% of all rail employees. The NRLC represents its member railroads both in national collective bargaining with unions pursuant to the Railway Labor Act ("RLA") and in regard to, *inter alia*, issues impacting on the statutorily-mandated grievance/

arbitration process for the resolution of all grievances arising out of railroad and airline collective bargaining agreements.[1]

This case concerns the applicability of the Seventh Amendment right to jury trial in an action, brought under the Labor Management Relations Act ("LMRA"), by a group of employees against their union alleging that the union breached its duty of fair representation ("DFR") by mishandling the employees' grievance against their employer during contractually-mandated arbitration proceedings. It must be emphasized at the outset that the instant case presents that DFR claim in a highly unusual posture. Typically this type of DFR claim is joined with a claim against the employer based on the employees' underlying grievance, resulting in a so-called "hybrid" action. In these hybrid actions, the DFR claim is used primarily as a lever to vacate the adverse arbitration award and reopen the merits of the employees' underlying grievance. See *infra* p. 6. In this case, however, the employer declared bankruptcy during the pendency of proceedings, and hence the employees' DFR claim against the union is being litigated on its own.

The nation's railroads have an acute interest in ensuring that the Court's opinion in this case does not undermine the statutorily mandated system for arbitration of employee grievances under the RLA, which applies to both the railroad and airline industries. See 45 U.S.C. §§ 153, 184. While this Court has warned against the wholesale importation of LMRA rules into the RLA, see *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383-84, 395 (1969); *Brotherhood of R.R. Trainmen v. Chicago River & I. R.R.*, 353 U.S. 30, 31 n.2 (1957), both this Court and the lower courts have sometimes looked to the NLRA and LMRA in construing

[1] Letters of consent from counsel for the parties to the filing of this brief are being lodged with the Clerk of this Court.

the Railway Labor Act, see *Jacksonville Terminal Co.*, 394 U.S. at 383; *Steele v. Louisville & N. R.R.*, 323 U.S. 192, 200-01 (1944).

In the present case there are three issues crucial to the dispute resolution process under the RLA that, while not directly raised by the question presented to this Court, could be affected by the Court's opinion. First, because the employer in this case has declared bankruptcy, the Court is not presented with deciding whether employees have a right to a jury trial on their DFR claim where that claim is part of a hybrid case that also seeks an order vacating an arbitration award and reopening the underlying grievance against the employer. Second, because this case arises under the LMRA, the Court is not presented with the question whether "hybrid" cases even properly exist under the RLA. Although rail unions are subject to a duty of fair representation, it is unresolved whether proof of a DFR breach is a basis for vacating arbitration awards under the RLA, which, unlike the LMRA, expressly lists three exclusive grounds for reopening arbitration awards—*not* including a DFR breach by the union. Finally, and again because the instant case does not arise under the RLA, the Court is not presented with the question whether, even if hybrid cases may be brought under the RLA, a court that finds that the union committed a DFR breach in handling the initial grievance/arbitration proceeding must refer the case back to arbitration for a new arbitration proceeding, rather than resolving the merits of the underlying grievance itself, given that arbitration of *all* employee grievances under the RLA is mandated *by statute*.

The NRLC accordingly urges the Court to take note that these important issues remain unresolved and, while not directly raised by this case, could be affected by the Court's opinion here. In the rest of this brief we show that, with respect to the issues directly raised herein, the court below erred in holding that the employees in this

case have a Seventh Amendment right to a jury trial. The existence of such a right turns on a two-pronged test asking (1) whether the nature of the claim is more closely analogous to claims that lay at law or in equity prior to their merger, and (2) whether the remedy sought is legal or equitable in nature. *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2790 (1989).

First, a claim that the union committed a DFR breach by mishandling a grievance/arbitration proceeding is most closely analogous to a common law suit for breach of a fiduciary duty. *Leach v. Pan American World Airways*, 842 F.2d 285, 290 (11th Cir. 1988); *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480, 498 (1957) (Frankfurter, J., concurring). Both spring from the same equitable principles that apply where there is a special relationship of trust and confidence reposed by one person in another. *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944). Further, the standards of conduct for fiduciaries and unions are directly parallel, in that each may be found to have breached their duty if they act in a "discriminatory, dishonest, arbitrary, or perfunctory fashion," *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). Because a suit for breach of a fiduciary duty has historically been viewed as an equitable claim, *In re Evangelist*, 760 F.2d 27, 29 (1st Cir. 1985), the kind of DFR claim at issue in this case must likewise be deemed to be equitable in nature for Seventh Amendment purposes.

Second, the remedies associated with a DFR claim that the union mishandled the grievance/arbitration process are equitable in nature. In the typical situation where such a claim is brought as part of a hybrid case, the primary, and indeed indispensible, relief sought through the DFR claim is vacation of the arbitration award adverse to the employees' grievance. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). It is settled that orders vacating arbitration awards are equitable in nature. *Der-*

inger v. Columbia Transp. Div., 866 F.2d 859, 863 (6th Cir. 1989). The employees' claim for monetary damages against the union does not affect the conclusion that the remedy is equitable for Seventh Amendment purposes. Because a claim for a breach of fiduciary duty lies solely in equity, plaintiffs asserting such claims are not entitled to jury trials even if they seek monetary damages —indeed, even if they seek *only* monetary damages—as a remedy for the alleged fiduciary breach. *Krinsk v. Fund Asset Mgmt., Inc.*, 875 F.2d 404, 414 (2d Cir. 1989). The same rule applies to the kind of DFR claim at issue in this case—both where it arises in the normal hybrid case context and where, as here, it is brought on its own—since the DFR action, by analogy to the fiduciary duty action, lies solely in equity. Likewise, it is settled that where monetary damages may be awarded solely as an incident to equitable relief, the damages are considered equitable for Seventh Amendment purposes. *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975). That too applies to this kind of a DFR action in the typical hybrid case setting, since any award of damages from the union on the DFR claim is necessarily incidental to the more fundamental, and predicate, order vacating the initial arbitration award. Accordingly, the remedies for the kind of DFR breach at issue here, both in a hybrid case seeking an order vacating arbitration in addition to monetary damages and in an atypical case seeking monetary damages alone, must be deemed equitable for Seventh Amendment purposes.

ARGUMENT

I. INTRODUCTION

Under this Court's precedent, the applicability of the Seventh Amendment to a statutory cause of action, such as a claim that a union has breached its duty of fair representation, turns on a two-pronged analysis. First, the Court must "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity" to determine whether the present action is more closely analogous to actions that historically could only have been brought at law or to those that lay in equity. *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2790 (1989); *Tull v. United States*, 481 U.S. 412, 417-18 (1987). Second, the Court must examine "the remedy sought and determine whether it is legal or equitable in nature." *Tull*, 481 U.S. at 418. As this Court has recently said, the nature of the remedy is generally the "more important" of these factors. *Nordberg*, 109 S. Ct. at 2790.

In applying these principles to the kind of DFR claim at issue here—alleging that the union mishandled a grievance/arbitration procedure—it is essential to recognize that the instant case arrives in this Court in a most unusual posture. Typically such a DFR claim will be joined in a so-called "hybrid" lawsuit with a claim against the employer to reopen the merits of the employees' underlying collective bargaining agreement grievance. See, *e.g.*, *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Bowen v. United States Postal Service*, 459 U.S. 212 (1983); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981). Although the complaint in this case included such a claim, the employer declared bankruptcy during the pendency of district court proceedings. See 863 F.2d at 335 n.1. Accordingly, because the claim against the employer was stayed and the employees proceeded on their DFR claim

against the union alone, this case presents this Court with the DFR claim removed from its ordinary context.

We show in this brief that the right to jury trial does not apply to the kind of DFR claim at issue in this case regardless of whether it is the sole claim in the case—as it is here—or is instead part of a hybrid case—as is normally the case. However, because the analysis is somewhat different—and indeed even clearer—in the case where the DFR claim is part of a hybrid action, we discuss both situations separately below.

II. BACKGROUND LEGAL PRINCIPLES

A. The Exclusivity and Finality of Arbitration

Employees who believe that they have been injured by their employer's alleged violation of a collective bargaining agreement generally *cannot* bring their claim against the employer in federal court. Although § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, provides a cause of action in federal court for breaches of collective bargaining agreements arising under that Act, almost all collective bargaining agreements contain mandatory grievance/arbitration clauses that make union-initiated arbitration the sole remedy for such breaches and thus prevent the employees from suing the employer directly in federal court. See, *e.g.*, *United Paperworkers Int'l Union v. Misco, Inc.*, 108 S. Ct. 364, 370 (1987); *Republic Steel Corp. v. Maddox*, 370 U.S. 650 (1965). The exclusivity of arbitration is even more pronounced under the RLA, which *statutorily mandates* arbitration of *all* grievances arising out of railroad and airline collective bargaining agreements. See 45 U.S.C. §§ 153 First (i), 184; *Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 322 (1972). In general, once an arbitrator has resolved the employees' grievance or has held that the time limits for bringing the grievance have expired, the results are "[s]ubject to [only] very limited judicial review" and the employees are "bound by the

result." *DelCostello*, 462 U.S. at 164; see also *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978).

B. The Hybrid Case Exception to the Finality of Arbitration Awards

1. *The LMRA.* This Court has implied a limited exception to the finality of the arbitration process *under the LMRA* in cases where the employees prove that "the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation." *DelCostello*, 462 U.S. at 164; see *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567, 572 (1976); *Vaca v. Sipes*, 386 U.S. 171, 185 (1967). In cases where the union has "wrongful[ly]" refused to pursue a claim to arbitration, the court may, *inter alia*, compel the union to arbitrate the claim. *Vaca*, 386 U.S. at 185. In cases where a prior arbitration award has been "tainted" by the union's breach, and where the employer is joined as a defendant, the courts must "remove" any "bar" to reopening the merits of the employees' underlying grievance against their employer. *Hines*, 424 U.S. at 567.

In this regard, this Court has also recognized that, *under the LMRA*, the DFR claim against the union may be joined together, in a single action, with a claim against the employer based on the underlying labor grievance, creating a so-called hybrid case. *Hines*, 424 U.S. 554; *DelCostello*, 462 U.S. 151. However, because the results of the arbitration process are final and binding on the employee unless and until they are set aside by the court in order to remedy the union's DFR breach, the employee must "show that the [u]nion's duty to represent him fairly at the arbitration ha[s] been breached *before he [is] entitled to reach the merits of his contract claim.*"

Mitchell, 451 U.S. at 62 (emphasis added); see, *e.g.*, *Adams v. Budd Co.*, 846 F.2d 428, 434 (7th Cir. 1988).

2. *The RLA.* Although rail unions are also subject to DFR claims for mishandling grievances under the RLA, see *Czosek v. O'Mara*, 397 U.S. 25 (1970), the Court has *not* addressed the issue of whether proof of such a breach provides a basis for undoing the binding nature of arbitration awards *under the RLA*. Unlike the LMRA, which provides no express limitations on the scope of judicial review of arbitration awards, the RLA expressly states that arbitration orders may be set aside or remanded only in *three* specific situations: (1) where the arbitration board failed "to comply with the requirements of [the Act]"; (2) where the arbitration board failed "to conform, or confine itself, to matters within the scope of the division's jurisdiction"; or (3) where a member of the arbitration board is guilty of "fraud" or "corruption." See 45 U.S.C. § 153 First (q). This Court has "time and again emphasized that this statutory language means just what it says" and that railroad arbitration awards "may be set aside *only for the three reasons specified*" in the statute. *Sheehan*, 439 U.S. at 93 (emphasis added).[2] Accordingly, because a DFR breach is not one of the three enumerated grounds for vacating an RLA arbitration award, we believe that the DFR exception to the finality of arbitration awards implied under the LMRA in *Vaca* and *Hines* is *not* applicable under the RLA. See *Crusos v. United Transp. Union*, 786 F.2d 970, 972 (9th Cir. 1986) (Kennedy, J.); *United Steelworkers of America v. Union R.R.*, 648 F.2d 905, 913 (3d Cir. 1981). However, because several lower courts have (without addressing this analysis) im-

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[2] Moreover, as this Court has noted, because the RLA gives employees a statutory right to process their grievance themselves, without union participation, 45 U.S.C. § 153 First (j), rail and airline unions cannot "prevent" arbitration from taking place, unlike unions with the sole power to process grievances under the LMRA. *Bowen*, 459 U.S. at 229.

ported such an exception from the LMRA context[3] and this Court has not resolved the issue as yet, the existence of such an exception under the RLA remains unresolved at this time. And since vacation of the arbitration award is a necessary predicate to relitigating the grievance against the employer, it is similarly unsettled whether "hybrid" cases of the kind recognized under the LMRA may properly be brought under the RLA.

C. Handling the Underlying Grievance in Hybrid Cases

1. *The LMRA.* As this Court has recognized, the threshold determination in a hybrid case as to whether the union has breached its duty of fair representation during the grievance/arbitration process does *not* involve resolution of the merits of the employees' underlying grievance. In *Mitchell* this Court expressly distinguished between "a demonstration that the [u]nion breached its duty of fair representation" and "a showing under traditional contract law that the [employer's action] was a breach of the collective-bargaining agreement." 451 U.S. at 62. Specifically, in order to prevail on their DFR claim, the employees need only show that the union's conduct was "arbitrary, discriminatory, or in bad faith" and either "tainted" the arbitration or "prevented" arbitration from taking place. *Vaca*, 386 U.S. at 185, 190 (citations omitted); *Hines*, 424 U.S. at 571, 572. While resolution of this issue may require determination that the employee "had a plausible claim on the merits, perhaps even a fairly strong claim," it does *not* require a decision that the employee "had a claim that he was *bound to win.*" *Stanton v. Delta Air Lines*, 669 F.2d 833, 838-39 & n. 7 (1st Cir. 1982) (Breyer, J.) (emphasis in original); accord *Wood v. International Brotherhood of Teamsters*, 807 F.2d 493, 500 (6th Cir. 1986).

[3] *E.g., Barnett v. United Air Lines*, 738 F.2d 358, 362 (10th Cir. 1984); *Childs v. Pennsylvania Fed'n BMWE*, 831 F.2d 429, 439 (3d Cir. 1987).

The question thus arises as to whether, once a DFR breach has been found and the initial arbitration award has been vacated, the underlying grievance against the employer is to be resolved in court or by referral back to arbitration. Although this Court has never squarely addressed that issue,[4] the lower courts have generally either assumed or held that the grievance should be resolved in court.[5] We believe that the courts' assumption of jurisdiction in such circumstances to resolve these otherwise-arbitrable disputes arising out of collective bargaining agreements under the LMRA is erroneous and runs contrary to recent precedent from this Court. In particular, this Court has reaffirmed its strong support for resolving disputes in arbitration wherever possible,[6] particularly in the labor context,[7] and has expressly held

[4] In *Vaca*, the Court expressly indicated that referral to arbitration is "one of the available remedies when a breach of the union's duty is proved." 386 U.S. at 196. In *Hines*, the Court held that a tainted arbitration award should be vacated, but did not decide whether the grievance should be relitigated in court or referred back to arbitration.

[5] *E.g., Kissinger v. United States Postal Service*, 801 F.2d 551 (1st Cir. 1986); *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888 (4th Cir. 1980). In *Varra v. Dillon Companies, Inc.*, 615 F.2d 1315, 1317-18 (10th Cir. 1980), and *Santos v. American Broadcasting Co.*, 866 F.2d 892 (6th Cir. 1989), though, the courts properly recognized a presumption in favor of arbitration.

[6] See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989) (claims under Securities Act of 1933); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (claims under Securities Exchange Act of 1934 and RICO); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (claims under antitrust laws). Just last term, this Court reaffirmed the need to "discourage litigants" from trying to bring arbitrable disputes into court by "manipulating their allegations," and accordingly overruled a 1953 precedent that allowed certain securities claims to be brought in court instead of arbitration. *Rodriguez de Quijas*, 109 S. Ct. at 1922.

[7] See, *e.g., Misco*, 108 S. Ct. 364; *AT&T Technologies, Inc. v. CWA*, 475 U.S. 643 (1986).

that the federal policies favoring arbitration are sufficiently strong to justify bifurcating federal court actions in order to refer arbitrable claims to arbitration.[8] Of course, the strong policies in favor of arbitration of labor grievances, including particularly the need for expertise in the interpretation of collective bargaining agreements, are equally applicable where the union's DFR breach requires that the merits of an employee's grievance be resolved a second time.[9]

In sum, this Court has held that, under the LMRA, employees should not suffer, and employers should not profit, as a result of a union's DFR breach. *Vaca*, 386 U.S. at 195-96; *Hines*, 424 U.S. at 569-70. But requiring that the employees rearbitrate their grievance against the employer (before a new arbitrator and with representation of their own choosing) would simply put them back in the position that they were in prior to any misconduct by the union. Accordingly, rearbitration would afford them a full and fair remedy for the union's DFR breach without depriving the blameless employer of its right to arbitration and without undermining the strong federal interests in favor of the arbitration of labor disputes by experts familiar with the law of the shop.

2. *The RLA.* Under the RLA, as noted at pp. 9-10 above, it is unsettled whether proof of a DFR breach

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[8] *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218-21 (1985) (involving the Federal Arbitration Act, whose pro-arbitration policies are comparable to those in the labor law context).

[9] As this Court has recognized, those policies include (1) securing the "prompt," "inexpensive," and "final" settlement of grievances, *Nolde Bros., Inc. v. Local No. 358*, 430 U.S. 243, 254 (1977); see also *Bowen v. United States Postal Service*, 459 U.S. 212, 226 (1983); (2) providing the expertise necessary to properly interpret collective bargaining agreements, *Nolde Bros., Inc.*, 430 U.S. at 253-54; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); and (3) ensuring uniformity of dispute resolution, *Bowen*, 459 U.S. at 226.

justifies vacating an arbitration award, and hence whether hybrid actions seeking to reopen arbitration awards may properly be brought at all. Even assuming *arguendo* that such actions can be filed, we think it clear that, if a DFR breach is proved, the only proper course in an RLA case would be to refer the underlying grievance back to arbitration for an untainted determination by a new arbitrator. Unlike § 301 of the LMRA, which generally provides a federal court forum for the resolution of employee grievances absent a contractual arbitration clause, § 3 of the RLA *statutorily mandates* that all railroad and airline grievances be resolved exclusively *in arbitration.* 45 U.S.C. § 153; see p. 7 *supra.* This Court has repeatedly held that that provision must be strictly enforced,[10] in order to fulfill the strongly pro-arbitration goals of the RLA.[11] For these reasons, several courts have properly held that, where a DFR breach is shown in an RLA case, "the burden . . . rests on those opposed to arbitration as a remedy to demonstrate why it is unsuitable." *Stanton*, 669 F.2d at 836-37; accord *Curtis v. United Transp. Union*, 486 F. Supp. 966, 972, 979 (E.D. Ark. 1979), *rev'd on other grounds*, 648 F.2d 492 (8th Cir. 1981).[12]

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[10] See *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2484 (1989); *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978); *Andrews v. Louisville & N. R.R.*, 406 U.S. 320 (1972).

[11] Requiring arbitration of RLA grievances is essential to secure that Act's goals of (1) the "prompt and orderly" settlement of disputes, 45 U.S.C. § 151a(5); *Sheehan*, 439 U.S. at 94; (2) the use of arbitrators possessing the "specialized technical knowledge" needed to interpret railway labor contracts, *Pennsylvania R.R. v. Day*, 360 U.S. 548, 553 (1959); *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, 243 (1950); and (3) the assurance of uniformity of contract interpretation, *Day*, 360 U.S. at 553.

[12] *But see, e.g., Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902 (6th Cir. 1983); *Middleton v. CSX Corp.*, 694 F. Supp. 941, 947 (N.D. Ga. 1988).

D. Damages Against the Union

If, following a finding that the union breached its duty of fair representation, it is determined (either in court or back in arbitration) that the employees' underlying grievance is valid,[13] the employees may be entitled to recover, in court,[14] additional relief from the union for the "increase, if any, in . . . damages" caused by the union's conduct. *Vaca*, 386 U.S. at 195-98 (LMRA); see *Bowen*, 459 U.S. at 223 (LMRA); *Czosek*, 397 U.S. at 29 (RLA). In this way, the employees can be fully returned to the position they would have occupied if the union had not breached its duty.[15]

E. Atypical Cases Where the Employees Bring the DFR Claim Alone, Rather than as Part of a Hybrid Case

In rare situations, such as the situation in the present case, employees may be forced (or may choose) to pursue a DFR claim arising out of their union's alleged mishandling of a grievance/arbitration proceeding as their only claim, rather than as part of a hybrid case against both their union and employer. In the present case, for example, the employer has gone into bankruptcy; similar situations could arise where the employer has been liquidated or has reached a separate settlement with the employees. This Court has recognized that, in such

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[13] It is settled that the employees cannot recover damages from the union without proving that their underlying grievance was valid. *DelCostello*, 462 U.S. at 165.

[14] If the underlying grievance is referred to arbitration, the arbitrator generally will not have power to award relief against the union. See, *e.g.*, *Vaca*, 386 U.S. at 196; *Czosek*, 397 U.S. at 27-28.

[15] Where the employees allege and prove that the union "affirmatively caused" the employer to commit the alleged breach of the labor contract. the union also may be held jointly and severally liable for any damages found owing to the employees because of the employer's breach. *Vaca*, 386 U.S. at 197 n.18.

circumstances, the employees still have the right to proceed with their claim against the union for its alleged DFR breach, although as just shown the damages recoverable from the union generally cannot include the injury directly attributable to the underlying contract breach.

As noted above, once a DFR breach is proved, the employees must show that their underlying grievance was valid in order to show that the union's DFR breach led to injury entitling them to monetary damages from the union. In these atypical non-hybrid cases where the employer is absent, it may well be impossible for the underlying grievance to be referred to arbitration. Under such circumstances, and solely for purposes of disposing of the DFR claim against the union, the court must itself determine whether the employees' underlying grievance was in fact valid. Of course, because the employer is absent, that determination is not binding on the employer, and its resolution in court therefore does not contravene the policy considerations, discussed at pp. 11-12 *supra*, that support arbitration whenever possible.

III. THERE IS NO SEVENTH AMENDMENT RIGHT TO A JURY TRIAL WITH RESPECT TO THE KIND OF DFR CLAIM AT ISSUE IN THIS CASE BECAUSE IT IS EQUITABLE IN NATURE AND INVOLVES EQUITABLE REMEDIES

We show in this Part that the kind of DFR claim at issue in this case—alleging the mishandling of grievance/arbitration proceedings—carries no Seventh Amendment right to a trial by jury, because the claim is equitable in nature and involves equitable remedies.

A. The DFR Claim at Issue Is Most Analogous to a Pre-Merger Action for Breach of Fiduciary Duty, Which Was Equitable in Nature

As noted above, the first prong of the Seventh Amendment test requires an examination of whether the cause of action is legal or equitable in nature. The duty of fair

representation owed by a union to its members was implied by this Court from the federal labor statutes, see *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944); *Vaca v. Sipes*, 386 U.S. at 177, and has no precise 18th century counterpart at either common law or equity, see *Leach v. Pan American World Airways*, 842 F.2d 285, 290 (11th Cir. 1988). However, as we now show, the union's duty is derived from the same equitable principles that gave rise to actions for breach of fiduciary duties in 18th century courts of equity, and the standards of conduct applied to the union are identical to those applicable in fiduciary relationships.

1. *Source of the duty.* The common law recognizes the existence of a fiduciary duty where "special confidence [is] reposed" in a party that "is bound to act in good faith and with due regard to the interests of [the person] reposing [the] confidence." [16] The same underlying equitable principles led to recognition of a union's duty of fair representation. As this Court expressly said, the duty is derived from the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf . . . ." *Steele*, 323 U.S. at 202. As the flip side of the confidence employees repose in their unions, there is a need to protect employees who have been "stripped of traditional forms of redress." *Vaca*, 386 U.S. at 182; *Hines*, 424 U.S. at 564. Thus both common law fiduciary duties and a union's duty of fair representation arise from the same kind of relationship and the same equitable principles.

2. *Standards of conduct.* A union's duty of fair representation is "equal in scope to its authority," and requires it to act with "complete good faith and honesty of purpose in the exercise of its discretion." *Hines*, 424 U.S. at 564. As noted above, this Court has held that the duty may be violated, in a case of this kind, where the union acts in a particularly "discriminatory, dishonest, arbitrary, or perfunctory fashion." *DelCostello*, 462 U.S. at 164. The same standards of review apply to claims for breach of a fiduciary duty. As is well established, fiduciaries must not act in an arbitrary,[17] dishonest,[18] discriminatory,[19] or perfunctory [20] manner, but instead must exercise the "utmost good faith." [21] Thus the standards of conduct for a union are the same as those applicable to a fiduciary at common law.

3. *The DFR claim is therefore equitable in nature.* In short, the DFR claim at issue here most closely resembles a common law claim for breach of fiduciary duty. See *Leach*, 842 F.2d at 290; *NLRB v. Local 282, IBT*, 740 F.2d 141, 147 (2d Cir. 1984); *King v. Fox Grocery Co.*, 678 F. Supp. 1174, 1176 (W.D. Pa. 1988); accord *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480, 498 (1957) (Frankfurter, J., concurring) (union representatives handling grievance/arbitration procedures "are in what amounts to a fiduciary position").[22]

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[16] *Hunt v. Hunt*, 718 P.2d 560, 576 (Idaho 1986); *Brisson v. Williams*, 345 S.E.2d 432, 435 (N.C. App. 1986); *Brown v. Foulks*, 657 P.2d 501, 506 (Kan. 1983); *Long v. Towne*, 639 P.2d 528, 530 (Nev. 1982); *H-B Ltd. Partnership v. Wimmer*, 257 S.E.2d 770, 773 (Va. 1979); *Herbolsheimer v. Herbolsheimer*, 328 N.E.2d 529, 530 (Ill. 1975).

[17] *Nobile v. Pension Comm.*, 611 F. Supp. 725, 729 (S.D.N.Y. 1985); *Pastan v. Pastan*, 390 N.E.2d 253, 256 (Mass. 1979); *Galler v. Galler*, 238 N.E.2d 274, 277 (Ill. App. 1968).

[18] Uniform Fiduciaries Act (U.L.A.) § 1(2); *Hoffman v. First Virginia Bank*, 263 S.E.2d 402, 408 (Va. 1980).

[19] *Short v. United States*, 719 F.2d 1133, 1137 (Fed. Cir. 1983).

[20] *Burnett v. First National Bank of Waco*, 567 S.W.2d 873, 876 (Tex. Civ. App. 1978).

[21] *Black v. Dahl*, 625 P.2d 876, 880-81 (Alaska 1981), quoting *Mersky v. Multiple Listing Bureau*, 437 P.2d 897, 899 (Wash. 1968).

[22] In *DelCostello*, this Court suggested that a DFR claim might be considered most analogous to a claim for legal malpractice. 462 U.S. at 167. But evidently breach of fiduciary duty was not

Historically, cases seeking to redress a breach of fiduciary duty could be brought only in courts of equity and were not subject to trial by jury. See *In re Evangelist*, 760 F.2d 27, 29 (1st Cir. 1985); *Nobile v. Pension Committee*, 611 F. Supp. 725, 729 (SD.N.Y. 1985) (claim for "arbitrary and capricious" conduct restates "traditional standard of judicial review of fiduciaries' determinations" which has "traditionally been done by judges rather than juries"); *Kaitz v. District Court*, 650 P.2d 553, 555 (Colo. 1982); *In re Estate of Coyle*, 308 N.Y.S.2d 899, 902 (App. Div. 1970); *cf. Seminole Nation v. United States*, 316 U.S. 286, 298 (1942); *Trustees v. Journeymen Plasterers' Protective and Benevolent Society*, 794 F.2d 1217, 1220 (7th Cir. 1986). Because the DFR claim at issue in this case is most closely analogous to premerger actions for breach of fiduciary duty, therefore, the DFR claim must be classified as equitable for Seventh Amendment purposes.

4. *Atypical cases where the underlying grievance is litigated in court as part of the DFR claim.* As noted above, in unusual cases, like the present one, a DFR claim may be brought alone and the court may be required to adjudicate the employees' underlying grievance against their employer in the course of resolving the employees' entitlement to damages against the union on the DFR

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presented to the Court as a possible analogy in the *DelCostello* case, and in fact such an analogy is demonstrably more apt than is an analogy to malpractice. Most fundamentally, legal malpractice turns on whether the attorney was *negligent*, while a DFR claim, like a claim against an attorney for breach of fiduciary duty, turns on whether the union failed to act "in good faith and honesty of purpose in the exercise of its discretion." *Hines*, 424 U.S. at 564. See R. Mallen & J. Smith, *Legal Malpractice* § 11.1, p. 633 (3d ed. 1989) (noting that an attorney's fiduciary obligations involve a standard of conduct, while malpractice actions involve a standard of care, i.e., of skill and knowledge); *Bukoskey v. Shuham*, 666 F. Supp. 181, 184 (D. Alaska 1987) (same); *Newman v. Silver*, 553 F. Supp. 485, 495 (S.D.N.Y. 1982) (same), *aff'd in relevant part*, 713 F.2d 14 (2d Cir. 1983).

claim. See pp. 14-15 *supra*. But the fact that the court may have to decide whether the collective bargaining agreement was violated in order to determine the employees' entitlement to damages against the union does not make such a case primarily legal in nature. In such a case, the cause of action is still based solely on the alleged DFR breach, and the merits of the underlying grievance are addressed only as a *subsidiary* step in determining whether that breach caused the employees any injury entitling them to damages. Accordingly, even in the rare case, like the present one, where the DFR claim also incidentally involves resolution of the underlying grievance, breach of fiduciary duty must *still* be viewed as the most apt analogy for the employees' claim, and hence the claim still must be deemed equitable in nature.

B. The Remedies Involved in this Type of Fair Representation Claim Are Equitable Remedies

As noted above, the nature of the remedy sought is deemed the "more important" factor in determining whether a party is entitled to a jury trial. *Nordberg*, 109 S. Ct. at 2790. As we show in this section, the relief sought in connection with the kind of DFR claim at issue here is equitable, both in the typical hybrid case and even in cases, like this one, seeking only monetary relief against the union.

1. *Relief in the typical hybrid case.* As discussed in detail above, the principal relief sought by employees in connection with a DFR claim in a typical hybrid case is the vacation of the grievance/arbitration result adverse to the employees' grievance against the employer. See pp. 6, 8 *supra*. Only *after* such relief has been granted, and even then only *after* the employees have prevailed at the subsequent proceeding involving the merits of their underlying grievance,[23] can the employees seek monetary

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[23] As noted above, in all cases under the RLA and, we submit, in virtually all cases under the LMRA, a court finding a DFR breach

damages against the union for the DFR breach. See pp. 8-9, 14 *supra*.

It is well settled that orders vacating arbitration awards are equitable and carry no right to a jury trial. See, *e.g.*, *Deringer v. Columbia Transp. Div.*, 866 F.2d 859, 863 (6th Cir. 1989); *Leach v. Pan American World Airways*, 842 F.2d 285, 288 (11th Cir. 1988).[24] It is thus apparent that the primary—and essential—relief sought in a DFR claim in a hybrid case is equitable in nature. Courts focusing solely on the request for monetary damages from the employer and/or the union have simply overlooked the fact that vacation of the existing arbitration award is a necessary equitable predicate to moving on to the merits of the underlying grievance against the employer, as well as to any subsequent damages claim against the union.[25]

The fact that, in a typical hybrid case, the employees generally *also* seek monetary relief against the union in connection with their DFR claim does not mean that the remedies for that claim should be characterized as "legal" for Seventh Amendment purposes. This Court has recognized that monetary awards are not necessarily "legal" in nature. *Curtis v. Loether*, 415 U.S. 189, 196 (1974);

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in the handling of the initial grievance/arbitration proceeding must enter an equitable order compelling arbitration. See pp. 10-13 *supra*.

[24] Likewise, an order compelling arbitration is an equitable form of relief. *DelCostello*, 462 U.S. at 168 n.17.

[25] *E.g.*, *Cox v. C.H. Masland & Sons, Inc.*, 607 F.2d 138, 143 (5th Cir. 1979); *Cook v. National Maritime Union*, 617 F. Supp. 1052, 1053 (S.D.N.Y. 1985). Of course, some other cases finding a jury trial right in DFR claims involve DFR claims outside the context of the union's handling of a grievance/arbitration process and hence are inapplicable here. See, *e.g.*, *Quinn v. DiGiulian*, 739 F.2d 637, 638 (D.C. Cir. 1984) (claim that union engaged in "relentless campaign of harassment" against plaintiff due to his decision to run against incumbent officer).

accord Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975); *Cox v. Kansas City*, 76 F.R.D. 459, 459 (W.D. Mo. 1977). As shown at pp. 16-18 above, a claim for breach of fiduciary duty is an equitable claim, and courts have consistently held that plaintiffs asserting such claims are not entitled to jury trials even where they seek monetary damages as a remedy for the alleged fiduciary breach. See, *e.g.*, *Krinsk v. Fund Asset Mgmt., Inc.*, 875 F.2d 404, 414 (2d Cir. 1989) (seeking solely money damages); *Kaitz v. District Court*, 650 P.2d 553, 555 (Colo. 1982) (same); *Horizon House-Microwave, Inc. v. Bazzy*, 486 N.E.2d 70, 77 (Mass. App. 1985) (seeking money damages in addition to equitable relief).[26] It follows that, because a court's jurisdiction in a DFR suit is also equitable, see pp. 16-18 *supra*, any monetary damages that may be awarded in the course of such an action are necessarily equitable, and the claim for such damages does not entitle the plaintiffs to a jury trial.

By the same token, it is well settled that where monetary damages may be awarded only as an incident to primarily equitable relief, the monetary damages themselves are considered equitable and do not entitle the plaintiff to a jury trial under the Seventh Amendment. *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975) (no jury trial where monetary relief is an "integral part of the equitable remedy"); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969) (cited with approval in *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 375 (1979)); *King v. Fox Grocery Co.*, 678 F. Supp. 1174, 1177 (W.D. Pa. 1988) (monetary relief equitable where it "flows from" equita-

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[26] Put otherwise, because the claim for a breach of fiduciary duty raises a "traditionally equitable question" and because no monetary relief can be awarded "[u]nless and until that equitable question is resolved in [the plaintiffs'] favor," there is no right to a jury trial with respect to the claim for such monetary relief. *Nobile v. Pension Committee*, 611 F. Supp. 725, 729 (S.D.N.Y. 1985).

ble remedy vacating arbitration order); *Chrysler Workers Ass'n v. Chrysler Corp.*, 663 F. Supp. 1134, 1142 (N.D. Ohio 1986) (claim for monetary damages for DFR merely an incident to equitable relief); *Towers v. Titus*, 5 Bankr. 786, 795 (N.D. Cal. 1979). This principle is likewise applicable here, since any claim for damages against the union based on the DFR claim in a hybrid case is incidental to the primary relief of vacating the arbitration award, see pp. 19-20 *supra*, again leading to the conclusion that the claim for damages is itself equitable and provides no basis for a jury trial.[27]

In sum, when a DFR claim is brought in a hybrid case, both the primary relief sought through that claim—vacation of the arbitration award—and any incidental claim for damages against the union are equitable.[28]

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[27] The fact that equitable relief is a necessary predicate to the claim for money damages distinguishes the situation addressed in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959), and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473 (1962), which involved independent equitable and legal claims brought together in the same action. In *Ross v. Bernhard*, 396 U.S. 531 (1970), although equitable relief was a predicate to a claim for monetary relief, the latter claim arose out of a wholly separate cause of action.

[28] Moreover, even if it were found that the claim for monetary relief against the union is legal in nature, that would *not* entitle the employees to a jury trial on the merits of their DFR claim that the union mishandled the grievance/arbitration process and that the arbitration award should be vacated. This Court has recognized that "imperative circumstances" may justify prior determination of equitable claims that would otherwise be subject to the right to jury trial. *Beacon Theatres*, 359 U.S. at 510-11; *Dairy Queen*, 369 U.S. at 473; see also *Leach*, 842 F.2d at 289 & n.7. We submit that the federal policies involved in deciding whether to set aside a final arbitration award on the basis of a union's alleged DFR breach present such imperative circumstances.

Permitting juries to decide whether an arbitration award should be set aside would severely undermine the grievance machinery which this Court has recognized is "at the very heart of the system of industrial self-government." *United Steelworkers of America*

2. *Relief in a non-hybrid case not involving the employer.* As we have just shown, a court's jurisdiction over a fiduciary-type DFR claim lies in equity, and hence any monetary relief granted in such an action is deemed to be equitable. Indeed, that is true even where the only relief sought in such a case is money damages. *See, e.g., Krinsk v. Fund Asset Mgmt., Inc.*, 875 F.2d 404, 414 (2d Cir. 1989); *Kaitz v. District Court*, 650 P.2d 553, 555 (Colo. 1982). It therefore follows that, even in the atypical non-hybrid case where the employees do not sue the employer and hence are not seeking to vacate the adverse arbitration award, but instead are only seeking money damages against the union, they still are not seeking legal remedies and they still have no right to a jury trial.

C. Conclusion

In sum, the present DFR claim most closely resembles an equitable claim for breach of a fiduciary duty. The primary relief generally sought through such claims, va-

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v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581 (1960) Under the LMRA, the RLA, and the Federal Arbitration Act, the task of reviewing arbitration awards has been assigned *exclusively* to judges. *Misco*, 108 S. Ct. 364 (LMRA); *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (LMRA); 45 U.S.C. § 153 First (q) (RLA); 9 U.S.C. § 10(c) (Fed. Arb. Act). Creating a special exception to this rule in DFR cases would issue an open invitation to dissatisfied employees to challenge any adverse result merely by "tacking on a [fair representation] claim against their union in a federal court suit against their employer." *Bautista*, 828 F.2d at 552. Any increase in such challenges would greatly disrupt the "orderly" settlement of disputes, which the Court has recognized is "essential to the national labor policy," *Bowen*, 452 U.S. at 226, and could well "affect[] the entire relationship between company and union," *Mitchell*, 451 U.S. at 64 (citations omitted). Increased uncertainty would discourage labor and management from entering into arbitration agreements in the first place, would heighten the conflict and tension associated with labor disputes, and could ultimately threaten the peaceful labor-management relations that the national labor laws were intended to foster. See pp. 11-12 *supra*.

cation of an arbitration award, is equitable. Any monetary relief awarded in connection with such a claim is similarly equitable, whether or not it is incidental to a claim for equitable relief. In result, both prongs of the Seventh Amendment test show that the DFR claim at issue here is equitable. Plaintiffs are therefore not entitled to a jury trial on that claim.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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OCTOBER TERM, 1989

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL NO. 391,

Petitioner,

v.

THOMAS C. TERRY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR TEAMSTERS FOR A DEMOCRATIC UNION AS *AMICUS CURIAE* URGING AFFIRMANCE

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QUESTION PRESENTED

Are employees entitled to a jury trial in a "hybrid" action in which they sue for redress for their employer's breach of contract and for their union's failure to provide them with fair representation in presenting their claim of breach of contract, particularly when the forum that consists of an equal number of union and employer representatives?

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CHAUFFEURS, TEAMSTERS AND
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Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

BRIEF FOR TEAMSTERS FOR A DEMOCRATIC UNION AS *AMICUS CURIAE* URGING AFFIRMANCE

INTEREST OF *AMICUS CURIAE*

Amicus curiae Teamsters for a Democratic Union ("TDU") is a voluntary, unincorporated association of thousands of rank-and-file members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, who seek to reform and democratize their union, and in so doing, to make it more responsive to their needs. One of the perils of supporting reform within the Teamsters union, of which petitioner is a local, is that it often leads to economic reprisals by employers. Not surprisingly, the union leadership often fails to provide fair representation when employers fire reformers or otherwise subject them to adverse treatment on the job. The duty of fair representation ("DFR") and the right to sue the employer in a "hybrid" action for breach of the collective bargaining agreement, provided that the employee can prove that

the union has breached its DFR, are key components of the legal protection on which TDU members depend to safeguard their right to seek to improve their own union.

Most TDU members are covered by collective bargaining agreements similar to the one at issue in this case, which provides for submission of their grievances to groups, known as joint committees, that are comprised of equal numbers of union and employer representatives. TDU believes that the ability of union members to have their claims tried to a jury of their peers is crucial in sustaining the DFR as a meaningful "bulwark to prevent arbitrary [Teamster] union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor policy." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Therefore, it files this brief, with the written consent of the parties, to comment on the special need of Teamsters for the right to trial by jury in cases where joint committees are used to dispose of their contract claims.

ARGUMENT

Introduction

If the plaintiffs in this case had been suing for redress of a breach of an employment contract, or had been suing their union for tortiously interfering with or mishandling their contractual claims vis-a-vis an employer, there would be little doubt that it would be the sort of legal action that has traditionally been tried to juries, and that is covered by the constitutional right to a jury trial. Until this Court's decisions in *UPS v. Mitchell*, 451 U.S. 56 (1981), and *DelCostello v. Teamsters*, 462 U.S. 151 (1983), there was a consensus among the courts of appeals that, at least when employees are seeking back pay remedies, there is a right to a jury trial in "hybrid" actions to enforce the duty of fair representation against unions, and to enforce collective bargaining agreements against employers. *Cox v. H. Masland & Sons*, 607 F.2d 138 (5th Cir. 1979); *Minnis v. UAW*, 531 F.2d 850 (8th Cir. 1975). And, although one appellate court has understood *Mitchell*'s and *DelCostello*'s treatment of the analogy between the hybrid action and various state

causes of action as requiring rejection of the right to jury trial in such cases, *Leach v. Pan American World Airways*, 842 F.2d 285 (11th Cir. 1988), the bulk of the post-*DelCostello* appellate authority continues to support the right to a jury trial. *UTU Local 74 v. Conrail*, 881 F.2d 282 (6th Cir. 1989); *Terry v. Teamsters Local 391*, 863 F.2d 334 (4th Cir. 1988); *Quinn v. DiGiulian*, 739 F.2d 637, 646 (D.C. Cir. 1984); *Roscello v. Southwest Airlines*, 726 F.2d 217, 220 (5th Cir. 1984).

In this Court, the parties have focused on the question whether there is a right to a jury trial in the portion of the hybrid action that is filed against the union for breach of its DFR. This focus is quite natural, inasmuch as the breach of contract suit against respondents' employer, McLean Trucking Co., was derailed by McLean's bankruptcy. We are in general agreement with the argument of respondents that DFR claims against unions generally, as well as the particular claim that respondents are pursuing in this case, are protected by the Seventh Amendment's right to a jury trial. We do, however, note our agreement with the caution expressed by the D.C. Circuit in *Quinn v. DiGiulian*, 739 F.2d 637, 646-647 (1984), that district courts should be cognizant of "the danger that jury prejudice against unions . . . will infect the verdict and inflate damage awards," and consequently should be careful to guide the jury accordingly in that phase of the litigation.

In this brief, we focus instead on the aspect of petitioner's argument that relies on the assertion that the claim against the employer is an attempt to overturn an arbitration award as an important reason to treat the related claim against the union as a non-juryable equitable action, Pet. Br. 20-22, a view which petitioner's *amici* strongly second. National Railway Labor Conference Brief 7-15; Chamber of Commerce Br. 16-20. Respondents' principal answers to this contention are that they do not seek to overturn an arbitration but to obtain damages for what they lost from the underlying breach of contract, and that *Ross v. Bernhard*, 396 U.S. 531, 539-540 (1970), a case ignored by petitioner, holds that the fact that the underlying action comes before the court by virtue of a device that was once deemed equitable, does not bear on the right to a jury trial. Although

we agree with these responses, we think it unnecessary to rely on them, for two reasons that are explained in the pages that follow. In Section A of the brief we argue the contractual claim in this case was not arbitrated. To the contrary, it has been decided by a process of negotiation that does not have any of the qualities of an arbitration. Next, Section B of the brief shows that, because hybrid cases following the arbitration of a grievance constitute such a small part of the universe of all hybrid cases, it makes little sense to adopt a rule barring jury trials in all cases by virtue of an argument that, even if valid, would apply only to a few situations.

A. Because Joint Committees Decisions Are Not the Equivalent of Arbitration Awards, Cases Brought Contesting the Union's Conduct in a Joint Committee Proceeding Do Not Seek to Set Aside an Arbitration Award.

Petitioner and its *amici* have used the language of arbitration in discussing what happened in this case, but in fact the decision-making body that ruled on respondents' claims bore little resemblance to impartial arbitration, either before a single neutral arbitrator or before an arbitration panel headed by a third, neutral party. In fact, a joint committee decision rejecting an employee's claim is no more, and no less, than a decision by a Teamster member's own leadership to abandon his grievance at an early step in the grievance process, short of the type of arbitration contemplated by arbitration statutes. In order to understand this proposition, we examine the structure and operation of the Teamster joint committee and compare it to the more traditional grievance-arbitration process employed by other unions to resolve disputes arising under collective bargaining agreements.

In most unions, a worker who believes that his rights under the collective bargaining agreement have been violated consults a union representative who advises the member whether or not there is a viable claim to be made under the agreement. In some contracts, the very filing of a grievance form requires the approval of a union representative, such as a steward or business agent; in others, the

member is entitled to file a grievance on his own. In either case, the union then assumes responsibility for discussing the grievance with the employer who can grant or deny the relief requested. If the grievance is denied, then a union representative with greater authority decides whether to take the grievance up with higher management representatives, again with the possibility of denying, granting, or compromising the grievance. The grievance proceeds through this process until, finally, the grievance is discussed at the highest levels available under the grievance procedure (for example, between the local union president or grievance committee and the plant manager, or, in a multi-plant company with a national contract, between the representatives of an international union and the corporation's national labor relations staff).

At each "step" of the grievance procedure, both the union and the company have the power under the contract to concur in the position of the other. The company could decide to grant the grievance, the union could decide to abandon the grievance, or the two sides could settle the grievance by agreeing to a compromise. If the parties reach an agreement, the decision becomes final and binding under the contract, and cannot be set aside unless it is determined in a lawsuit such as this that the union has breached its duty of fair representation in declining to seek any relief, or in accepting less than complete relief, by not taking the grievance to the next higher step (or to arbitration). But if the two sides find themselves in disagreement at any step, and neither side is willing to yield, the grievance proceeds to the next step of the procedure, until ultimately the union invokes impartial arbitration.

The same sort of process takes place under the Teamsters' national contracts, but the succession of meetings between union and company representatives who meet to consider grievances and decide whether and how to settle them are decribed by the parties as "joint grievance committees." So, for example, under the National Master Freight Agreement at issue here, the first meeting will be between representatives of the local union and the employer at the local level. Article 44, Section 1. If these representatives cannot settle the grievance, because neither side is willing to com-

promise or abandon its position, the grievance is next considered by a joint committee for the states of North and South Carolina. This committee consists of an equal number of union and employer representatives, Article 43, Section 1, who may "settle" a grievance by majority vote. Assuming no settlement at this level, the grievance may then proceed to the Eastern Conference Joint Area Committee, Article 43, Section 2, and the National Grievance Committee, Article 43, Section 7. If the joint committees deadlock all the way to the top of the grievance procedure, the parties are entitled to use economic self-help (*i.e.*, a strike or lockout) to win the grievance.

Each committee consists of an equal number of union and employer representatives, with no neutrals or tie breakers. A majority vote is required in order to "decide" a grievance. Therefore, whenever a employee's grievance is "granted" by a joint committee, one or more of the company representatives must have voted to sustain the union's position; similarly, when a committee "denies" a grievance, one or more union representatives voted to sustain the employer conduct which precipitated the grievance. Thus, as Professor David Feller has observed, "A decision by a joint committee that a grievance lacks merit . . . is thus simply an agreement by the union that management did not violate the agreement." Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 837 (1971). *Accord*, *Humphrey v. Moore*, 375 U.S. 335, 352 (1964) (Justice Goldberg, concurring) (decision of Teamster joint committee is tantamount to "mutually acceptable grievance settlement between an employer and a union)."

The joint committee procedure also differs from the traditional union procedure in that, under some of the Teamster agreements (including the freight agreement at issue here), there is no mandatory arbitration at the end of the process. Rather, if there is a deadlock at the National Grievance Committee, each side is entitled to use economic recourse — *i.e.*, the union is free to strike — in order to obtain its objectives. In the alternative, the contract recognizes that the parties may refer the grievance to "an impartial arbitrator," but that, too, must be done by majority vote, Article 44, Sections 1(c) and 1(d), *see also* Article 8, Section 1, and so cannot be accomplished without the consent of both sides.

There is another reason why the assumption underlying petitioner's argument here — that grievance committees are simply another form of arbitration — is seriously misplaced. The joint committee system was originally formed by Farrell Dobbs, an early Teamster leader in the trucking industry, precisely because he distrusted arbitrators based on his view that their interests would inevitably be aligned with capital and against the working class. Rather than giving the right to decide the meaning of contracts (and thus, potentially, to eviscerate their protections) to arbitrators, Dobbs preferred to be able to wield the strike threat to maintain the contractual benefits that he had won at the bargaining table. James & James, *Hoffa and the Teamsters* 168 (1965). Jimmy Hoffa expanded the joint committee system to the entire trucking industry, although he did not share Dobbs' ideological bent. Instead, Hoffa used the joint committees not only to keep contractual application out of the hands of arbitrators, but also to maximize the leverage that he could bring to bear on operators, local union officials, or insurgents who contested his control. *Id.* at 31-33, 135, 167-185, 202.[1]

Another major difference between grievance procedures that conclude with an arbitration and the joint committee process is that Teamster officials do not exercise the screening function that officials of other unions do in deciding which cases should be taken to the joint committee. If every grievance culminated in a hearing before an arbitrator, the parties would be swamped in arbitrations. Thus, in *Vaca v. Sipes*, 386 U.S. 171, 191-192 (1967), this Court

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[1]Control over the grievance procedure translates into control over the leaders of subordinate bodies for the simple reason that a local leader recognizes that he cannot serve his constituents by winning grievances (and thus cannot expect to be reelected) unless he has the support of the members of the Teamster hierarchy who appoint the union representatives who sit on the grievance committees. *See* PROD, *Teamster Democracy and Financial Responsibility: A Factual and Structural Analysis* 26-28 (1976).

indicated that one of the reasons why it would impose liability on union officials only if their failure to take a case to arbitration was arbitrary, perfunctory, or discriminatory was that a stricter standard would encourage unions to arbitrate meritless grievances.

In the Teamsters union, however, this sifting does not occur among union officials before arbitration, but rather during the deliberations of the joint committees in which union officials participate along with their coequals representing the employers. Although elected local union officials may attempt to persuade a grievant to accept a compromise, absent the consent of the grievant practically every grievance is submitted to a joint committee. Then, grievances with little or no merit are compromised or abandoned by the union officials who sit on the joint committees; some meritorious grievances, particularly those filed by union insurgents, are also summarily dropped. And the harder and more important cases are passed up the union hierarchy to the regional and national committees.

The reason why joint committees are able to do the sifting that most other unions do before arbitration is that the committees use very different procedures from those used in true arbitration. In arbitration, the two sides normally present witnesses and documents, and cross-examine each other's witnesses. According to the most recent Annual Report of the Federal Mediation and Conciliation Service, the average labor arbitration hearing lasts one day, and on average the arbitrator spends another two days studying the briefs and preparing a decision. ***40th Annual Report, FY 1987***, page 21. By contrast, a panel of the joint committee typically hears between 15 and 30 grievances in a single day, with each grievance consisting of brief oral presentations by officials of the company and the local union, along with the submission of some documents and perhaps written statements by witnesses, but there is no "testimony." The joint committee actually decides the cases in executive session on the day that they are heard, and immediate rulings are issued without any explanation beyond "denied," "granted," or "deadlocked." On average, a panel spends fifteen minutes hearing from the two sides and five minutes deciding the

grievance. Summers, *Teamster Joint Grievance Committees: Grievance Disposal Without Adjudication*, Proceedings, 37th Annual Meeting, National Academy of Arbitrators 134-138 (1984).

Yet another difference between arbitration and the joint committee process is their attitude toward *ex parte* communications. The rules of arbitration strictly forbid *ex parte* contacts between the parties and the arbitrators, Rule 45, Labor Arbitration Rules, American Arbitration Association, but such contacts between interested union and employer officials and their counterparts on the joint committees are not only proper, but the "expected norm." *E.g.*, Azoff, *Joint Committees as an Alternative Form of Arbitration Under the NLRA*, 47 Tul. L. Rev. 325, 360-361 (1973). Indeed, before the joint committees meet, the two sides commonly conduct their own screening sessions among both the advocates and the joint committee members on that side. Each side uses such sessions to discuss the cases that are about to be heard, determine which cases are the most important, and consider the best way to present the important cases in order to persuade the other side to concur in a particular settlement of those grievances. Summers, *Grievance Disposal Without Adjudication*, *supra*, at 138-139.[2]

As the title of Professor Summers' essay suggests, another difference between arbitration and the joint committee system is that, although an arbitrator adjudicates each individual case on its own merits, the joint committees resolve grievances by the job lot and necessarily become involved in disposing of grievances that are deemed less important in order to obtain concessions on the more important grievances. Both sides know that, if they rigidly refuse to vote for the other side on every grievance, every case will be deadlocked and there will be numerous strikes. Thus, the parties

[2]Indeed, the local union officials who act as "advocates" in one case will sit as members of the joint committee in other cases during the same two or three day session of the joint committee, thus heightening the political atmosphere of the process and making the horsetrading of grievances inevitable. *Id.*

are strongly encouraged to engage in the horsetrading of grievances. In the words of Elliot Azoff, a Teamster lawyer who defended the joint committee system as a means of resolving labor disputes, "the joint committee is structured so as to insure maximization and exploitation of opportunities for wheeling and dealing. . . . [Although these problems] are common to all union grievance machinery, [t]he difficulties . . . are accentuated in the committee system . . .." 47 Tul. L. Rev. at 328-329.

Azoff nonetheless praised the committees for their ability, in effect, to amend the collectively bargaining agreement as necessary to carry out the wishes of the parties about how a particular collective bargaining dispute ought to be resolved, regardless of what the parties may have intended when the contract was negotiated in the first place: "While an arbitrator would be bound to apply the existing contract, [*see Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)], no similar limitation would restrict the actions of the joint committee that could modify, amend or supplement the original agreement." 47 Tul. L. Rev. at 348. This difference was recognized by Justice Goldberg in his concurring opinion in *Humphrey v. Moore*, 375 U.S. 335, 353 (1964), where he distinguished the powers of an arbitrator under most labor contracts, from the power of the union and the employer, operating through the mechanism of the joint committee, to amend the contract if it suits their needs.

To recognize the difference between joint committees and arbitration is not to deny Teamster employers the ability to agree with their unions that joint committees shall be the mechanism for achieving final and binding resolution adjustment of grievance disputes between them, just as the resolution of a grievance through the grievance and arbitration procedure is final and binding. *General Drivers v. Riss & Co.*, 376 U.S. 517 (1963) (result binds union and employer); *Humphrey v. Moore*, 375 U.S. 335 (1964) (result binds employees). Nor does recognition of the difference necessarily bear on the standard that should be applied to decide whether there has been a breach of the duty of fair representation; that question is

not presented here, and therefore should be decided another day.[3]

This explication of the marked differences between the arbitration process and the Teamster joint committees is simply directed to petitioner's argument that there is no right to a jury trial because respondents here are supposedly challenging an arbitration award, and that their claims are thus said to be akin to state-law actions to vacate an arbitration that have traditionally been considered equitable and hence non-juryable. Petitioner's argument is without foundation because, inasmuch as respondents' grievance was rejected by a joint committee, they are not seeking to overturn the equivalent of an arbitration decision, but a decision to abandon a grievance short of arbitration. Accordingly, the cases that provide for bench trials in suits to overturn a full-blown, neutral arbitration have no bearing here. Rather, in these circumstances the action against both the employer and the union is properly characterized as legal, and respondents were entitled to a trial by jury.

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[3]In that regard, a joint committee's decision to drop or compromise a grievance is "final and binding," much as the results of another union's grievance procedure would be. However, it should be recognized that a joint committee decision to deny a grievance necessarily represents the union's decision to drop that grievance, much as another union's decision not to arbitrate would be. Dropping or compromising grievances is not inherently unlawful; compromise is, after all, the essence of negotiation. But, in TDU's view, the decision of the union, acting through the joint committee, to drop the grievance should be examined through the prism of the duty of fair representation, rather than focusing exclusively on the performance of the union "advocate" before the grievance committee. Otherwise, the ability of the union to mask its rejection of the grievance behind a joint committee, whose reasons are never given, effectively places this Court's "bulwark to prevent arbitrary union conduct," *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), out of the reach of most Teamsters.

Although *UPS v. Mitchell*, 451 U.S. 56 (1981), which held that part of a hybrid action that seeks redress for the employer's breach of contract should be governed by state statutes of limitations that apply to actions under state law to vacate an arbitration award, involved a joint committee, no argument was made there to distinguish joint committees from true arbitration.

B. Jury Trials Should Be Generally Available in Hybrid Cases.

TDU's argument leads initially to affirming the decision below, upholding a jury trial in this case and rejecting the analogy to suits to vacate an arbitration award, because the joint committee here is not the equivalent of arbitration. If the Court were to declare that the presence of an arbitral award made a difference with respect to the right to a jury trial, it would in effect be lead to different treatment within the class of hybrid actions, allowing jury trials in cases not involving arbitration, but withholding the right to a jury trial in postarbitration cases. However, as the Court decided in *DelCostello v. Teamsters*, 462 U.S. 151, 166 n.16 (1983), it should avoid "knotty problems of categorization and consistency" that would be raised by providing different procedures for different kinds of hybrid cases.[4]

On the question of deciding *which* unitary rule to adopt, the Court should note that cases alleging union misconduct during an arbitration proceeding are a small minority of all hybrid cases. More than three-quarters of all hybrid actions are brought, not to set aside the decision of an arbitrator, but rather because the union has refused

[4]If the Court does decide to have a split rule, that could tend to lessen the Teamster union's incentive to use the joint committee system. Such a result, however, might be desirable for its own sake. Almost one-third of all duty of fair representation cases are brought by Teamsters, a fraction that is far out of proportion to the Teamsters' 10% share of the private-sector unionized workforce. Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 Buff. L. Rev. 89, 123-124 (1985). And, as noted below, 56% of the cases brought to challenge union misconduct in "arbitration" are involved the joint committees. *See infra* in text. *See also* Remarks of Robert Coulson, President of the American Arbitration Association, 107 LRR 147 (June 2, 1981): "The joint grievance committee system of arbitration found in Teamster contracts is so clearly defective as an impartial mechanism that it is not surprising that we keep seeing it tested in the courts." Thus, even if the granting of a right to a jury trial in joint committee cases had the indirect effect of encouraging the Teamsters union to move in the direction of bona fide arbitration, the final result might well be more finality and fewer DFR cases, which is certainly a result to be desired.

to take a worker's grievance to arbitration in the first place. Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 Buff. L. Rev. 89, 129 (1985) (data based on samples of courthouse files and published opinions). The Goldberg study included joint committee cases among one-quarter of all cases filed after an arbitration, but, as the study shows, 56% of the cases alleging union misconduct during an "arbitration" involved the joint union-management committees. *Id.* at 128.[5] Thus, if the Court agrees that cases alleging union conduct during a joint committee proceeding are not the equivalent of suits to set aside an abirtration award, only a tiny fraction of all hybrid cases — 44% of 25%, or barely more than 10% — are brought to set aside arbitration awards. Thus, the presence of an arbitration award should not dictate whether there is a right to a jury trial in hybrid cases, because that would truly allow the tail to wag the dog.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[5]This figure is derived by multiplying the fraction of postarbitration cases involving the Teamsters (66.2%) by the fraction of those cases that involved the joint committee (84.9%). *Id.* at 128.